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AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1311.

C. E. COOK, O. J. COOK, CYRUS FREASE, J. B. CHAMBERLAIN, JOHN JACKSON, AND J. LAWRENCE, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

RECORD FILED SEPTEMBER 26, 1890.

SUPREME COURT OF THE UNITED STATES.

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a In the Supreme Court of the United States, October term, 1890.

C. E. COOK ET AL., PLAINTIFFS IN ERROR,
vs.
THE UNITED STATES.

Stipulation as to printing of record.

It is hereby stipulated on behalf of the plaintiffs in error and the defendant in error that the clerk may print only so much of the record herein as is embraced within the printed bill of exceptions, and the printed assignments of error attached to the record.

JOHN F. DITTON,
For Plaintiffs in Error.
WM. H. TAFT,
Solicitor-General, for Defendant in Error.

(Indorsed:) Sup. Court U. S., 1890; Oct. term, No. 1311. C. E. Cook et al., plffs. in error, *vs.* The United States. Stipulation in regard to printing record.

(Stamp:) Office Supreme Court U. S. Filed Nov. 29, 1890. James H. McKenney, clerk.

b (Cover:) In the circuit court of the United States for the eastern district of Texas, holding sessions at Paris, Texas. April term, A. D. 1890. The United States vs. Samuel Robinson, C. E. Cook, O. J. Cook, J. B. Chamberlain, Cyrus Frease, John Jackson, J. Lawrence, and 23 others. Bill of exceptions. Rossington, Smith & Dallas, Hodges, Pollard & Hodges, B. E. Johnston, attorneys for defendants.

1 In the circuit court of the United States for the eastern district of Texas, holding sessions at Paris, Texas, April term, A. D. 1890.

THE UNITED STATES
vs.
SAMUEL ROBINSON AND 29 OTHERS. } No. 20.

Be it remembered that at a term of the circuit court of the United States for the eastern district of Texas, at Paris, Texas, begun and holden at the court room in the city of Paris, Texas, on the third Monday, the 21st day of April, A. D. 1890, there was present as the presiding judge of the said court Hon. Aleck Boarman, United States district judge, and the officers required by law. That the said the Hon. Aleck Boarman opened and convened the said court and presided therein as the sole presiding judge, on the 21st day of April, A. D. 1890, and
2 continued as such sole presiding judge continuously up to and including the 1st day of June, A. D. 1890. That among other causes then pending in said court there came on for trial the above-entitled cause, No. 20, of the United States *vs.* Samuel Robinson and 29 others, charged with the crime of murder. On the trial of said cause it was admitted by counsel for the United States and of the defendants, C. E. Cook, O. J. Cook, J. B. Chamberlain, John Lawrence, John J. Jackson, and Cyrus Frease that the Hon. Chauncey B. Sabin, who had

been the duly-appointed and qualified United States district judge of the eastern district of Texas, departed this life on the 30th day of March, 1890, and on the said 21st day of April, 1890, and up to and including the 1st day of June, A. D. 1890, the office of the United States district judge for the eastern district of Texas was vacant, and remained vacant until the 2d day of June, A. D. 1890, when the Hon. David E. Bryant, who had been duly appointed and confirmed, duly qualified by taking and subscribing the oaths of his said office as aforesaid. That the Hon. Aleck Boarman, the judge who opened, convened, and so presided over the said court, was at the date thereof, and is now, the United States district judge for the western district of Louisiana, duly appointed and qualified on the 20th day of November, 1888, was designated by an order entered of record at Galveston, to hold the district and circuit courts for the eastern district of Texas during the disability of Judge Sabin; and after the death of Judge Sabin he was, by an order from Judge Pardee, at Galveston,
3 designated to hold the courts in the eastern district of Tex. until the successor of Judge Sabin shall be appointed and qualified.

Be it also remembered that on the 25th day of April, A. D. 1890, a day of said term of said court, and while the Hon. Aleck Boarman was presiding over said court, the following order was made by the said court, and entered on the minutes thereof:

"20. The United States vs. Sam. Robinson and others.—It is ordered that a certified copy of the venire of petit jurors at this term of court be served on each of the defendants."

And thereupon, afterwards, on the 29th day of April, 1890, it being a day of said term of said court, the said defendants and the others arrested in the above-entitled cause were each served with a copy of the venire of the petit jurors at this (the said) term of said court, which said copy is as follows:

T. J. Chenowith, Savoy, Texas; J. O. Ewing, Paris, Texas; R. M. Chism, Paris, Texas; C. W. Walker, Clarksville, Texas; W. T. Cameron, Paris, Texas; Thos. R. W. Banks, Clarksville, Texas; Gibson Wyatt, Dodd City, Texas; Richard Perry, Bonham, Texas; Nat. Cooper, Bonham, Texas; John Ward, Bagwell, Texas; T. W. Troupe, Paris, Texas; H. Levine, Bonham, Texas; J. K. Bywaters, Paris, Texas; V. Bayless, Paris, Texas; Tillman Shaw, Paris, Texas; E. D. Jewett, Paris, Texas; Wm. Booth, Paris, Texas; J. E. Bryant, Detroit, Texas; John Fry, Clarksville, Texas; James Holligan, Paris, Texas; J. B. Hilliard, Paris, Texas; J. R. Dean, Detroit, Texas; D. C. Garrison, Clarksville, Texas; G. S. Agnew, Bonham, Texas; A. T. Garner, Paris, Texas; O. F. Parish, Paris, Texas; J. M. Anderson, Clarksville, Texas; T. M. Young, Clarksville, Texas; J. J. Nesbit, Honey Grove, Texas; W. W. Russell, Bonham, Texas; A. M. Bonham, Paris, Texas; S. L. Erwin,
4 Honey Grove, Texas; B. S. Burton, Bonham, Texas; W. K. Long, Paris, Texas; R. J. King, Clarksville, Texas; J. B. Johnson, Paris, Texas; N. E Curlee, Bagley, Texas; D. W. Yarbrough, Petty, Texas; B. W. Lewis, Paris, Texas; Creed Taylor, Paris, Texas; T. J. Moore, Bonham, Texas; T. J. Gaultney, Honey Grove, Texas; John N. Gabbart, Paris, Texas; J. M. Beeson, Honey Grove, Texas.

I, H. H. Kirkpatrick, clerk of the circuit court of the United States for the eastern district of Texas, at Paris, in the fifth circuit and district

aforesaid, do hereby certify the foregoing to be a true and correct copy of the venire of petit jurors as the same now appears on record in my office.

To certify which witness my hand and seal of said court, at Paris, in said district, this the 29th day of April, A. D. 1890.

[L. S.] H. H. KIRKPATRICK,
Clerk U. S. Circuit Court, E. D. T., at Paris.
By G. K. KIRKPATRICK,
Deputy.

That on the 6th day of May, 1890, it also being a day of said term of said court, the said judge of said court called the said cause for trial, and the Government, by its United States attorney, entered a nolle prosequi as to defendants Harry Lee, A. Noble, L. J. Pettijohn, Grant Humphreys, B. E. Stehle, J. E. Feasor, J. B. Izor, P. H. Furguson, and Charles Calvert, who were indicted in the bill of indictment in this cause. Thereupon both the attorneys for the United States and the defendants, C. E. Cook, J. B. Chamberlain, A. M. Donald, Ed. Bowden, J. W. Calvert, William O'Connor, Cyrus Frease, John J. Jackson, John Lawrence, W. S. Grubb, and John A. Rutter, announced ready for trial. The cause was then by the court, on its own motion, passed to the 9th day of June, A. D. 1890.

And further be it remembered that on the 3d day of June, A. D. 1890, the United States attorney filed among the papers of this cause the following motion, to wit:

5 No. 20. THE UNITED STATES } Murder.
vs.
SAMUEL ROBINSON ET AL. }

Suit pending in the United States circuit court for the eastern district of Texas, holding sessions at Paris, Texas.—April term, 1890.

The United States attorney in the above cause relates to the court that in said cause there are thirty defendants; that said defendants reside in the State of Kansas; that they are charged in this and three other indictments pending in this court, with the murder of Sheriff John Cross and three other men of his posse, in what is called "No Man's Land," and also with an assault to murder one Herbert Tonney, who was also one of said Cross party.

That the circumstances of the killing and other matters connected with the difficulty, have been matters of constant comment by the people and press of Paris since this court began.

That since the opening of this term of court there have been constantly in attendance upon the same from two to three hundred witnesses and citizens from Kansas who are interested either as friends or witnesses in the matters of the prosecution or defense.

That such have been the comments, discusssion, and activity of the friends and relatives of the defendants and deceased, and also the press of Paris and of Kansas, that it is impossible that jurors composing the regular venire of this court, and also the citizens of Paris and Lamar County, could not have become familiar to a great extent with the matters charged in the indictment,

and denied by the defendants, and of the evidence pro and con to such an extent as to be disqualified as jurors in this cause.

Wherefore, relator asks that a special venire of sixty men from which to select a jury in this cause, and also causes Nos. 25, 26, and 27, be drawn and summoned as the law directs from the counties of Fannin and Red River, in this district. Said venire to be made returnable on Monday, the 9th day of June, 1890, and that copies of the same be served upon the defendants and each of them at least two full days next before the 9th day of June, 1890, the day of the trial of the same.

All of which your relator respectfully presents and prays accordingly.

JOSEPH H. WILSON,
U. S. Attorney, E. D. T.

6 And thereupon, on the same 3d day of June, A. D. 1890, the following proceedings were had and order of the court made and entered upon the minutes of said court, to wit:

"This day came the U. S. district attorney and moved that a venire of sixty persons be ordered to serve as jurors in the trial of causes numbers 20, 25, 26, and 27, and it appearing to the court that it is proper and necessary, it is ordered that sixty qualified jurors be drawn from the counties of Red River and Fannin, to appear at 9 a. m. on Monday, June 9, 1890, to serve as petit jurors."

To which proceedings, ruling, and order of the said court the said defendants, by their counsel then and there excepted in open court.

And thereupon, on the 6th day of June, 1890, each of the said defendants were served with another list of names, and each of them different from those named in the list and venire first served upon them. Said last-named list of persons appeared from the clerk's certificate to be a copy of the venire of petit jurors as the same appears of record in his office, and the same with the certificate of the said clerk is as follows:

P. H. White, Honey Grove, Texas; W. L. Nunnelly, Clarksville, Texas; S. B. Howard, Bonham, Texas; J. C. Boyt, Dodd City, Texas; Theodore Hancke, Clarksville, Texas; Hade Whitsett, Dodd City, Texas; A. P. Gray, Clarksville, Texas; J. W. Sowell, Bonham, Texas; Ben Washington (col'd), Bonham, Texas; F. P. Wells, Bonham, Texas; J. H. Newsom, Bagwell, Texas; Robt. T. Hunter, Bonham, Texas; W. W. Walker, Clarksville, Texas; W. T. Sneed, Clarksville, Texas; Dave McAnear, Clarksville, Texas; G. A. McCaslin, Detroit, Texas; R. L. Moore, Clarksville, Texas; A. L. Wilkins, Honey Grove, Texas; W. H. Wilcox, Clarksville, Texas; Page Trotter, Savoy, Texas; Carl Wright (col'd), Clarksville, Texas; Jno. Sparger, sr., Bonham, Texas; Monroe
7 Wells, Bonham, Texas; J. E. Van Dyke, Clarksville, Texas; Richard Peck, Annona, Texas; B. P. Elmore, Detroit, Texas; Ed. Byrd, Detroit, Texas; Dave Raney, Clarksville, Texas; M. J. Jackson, Bonham, Texas; T. W. Trout, Honey Grove, Texas; Joseph N. Peck, Annona, Texas; Wm. Smith, Clarksville, Texas; T. B. Spelce, Honey Grove, Texas; A. J. McDade, Dodd City, Texas; Horace Smith, Dodd City, Texas; J. L. Reed, Clarksville, Texas; J. C. Roberts, Bonham, Texas; Owen Reich, Bonham, Texas; Joe Adkins, Detroit, Texas; Sam Carter, Bonham, Texas; B. R. Stephens, Bonham, Texas; Sam Oldham, Bonham, Texas; Jack J. Prichett, jr., Savoy, Texas; Dent Rowland,

Clarksville, Texas; Marshal Swain, Clarksville, Texas; Joe Smith, Clarksville, Texas; J. W. Jackson, Bonham, Texas; L. C. Wilson, Bonham, Texas; Geo. W. Long, Savoy, Texas; Wm. Locke, Bonham, Texas; I. B. Reed, Clarksville, Texas; N. F. Miller, Honey Grove, Texas; Jim Sloan, Annona, Texas; Frank Jones, Bonham, Texas; G. B. Dean, Detroit, Texas; E. J. Ward, Clarksville, Texas; Tom Doak, Annona, Texas; B. O. Wallcot, Honey Grove, Texas; John F. Daniels, Annona, Texas; Jas. Simpson, Dodd City, Texas.

I, H. H. Kirkpatrick, clerk of the circuit court of the United States for the eastern district of Texas, at Paris, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of the venire of petit jurors as the same now appears on record in my office; to certify which, witness my hand and the seal of said court, at Paris, in said district, this the 5th day of June, A. D. 1890.

[L. S.] (Signed) H. H. KIRKPATRICK,
Clerk U. S. Circuit Court, E. D. T., at Paris.

Thereafter, on the 9th day of June, 1890, said cause was called, and continued to 10th, on account of the illness of counsel for the defendants.

Thereupon, afterwards, on the 10th day of June, 1890, the said cause was again called for trial, when the Government announced ready for trial. Then the said defendants C. E. Cook, O. J. Cook, J. B. Chamberlain, John Lawrence, John J. Jackson, Cyrus Frease, William O'Connor, J. W.
8 Calvert, W. S. Grubb, A. M. Donald, Ed. Bowden, and John A. Rutter, in their own proper person and by their counsel, challenged the array of the jurors last served upon them—

1st. Because these defendants were served with a true and correct copy of the venire of petit jurors summoned for the present term of this court.

2d. Because said last-named venire was drawn and summoned since these defendants announced ready for trial on a former day of this term of this court, and since they were served with the venire summoned for this term.

3d. Because there has been no order of this court setting aside the said venire summoned for this term of this court and served upon these defendants.

4th. Because said last-named venire was summoned from Red River and Fannin Counties and not from the body of the district in which this court is held, as these defendants have a right to have the jurors come by whom they are to be tried.

5th. Because the jurors summoned for the term are now in attendance upon the court, and no reason is shown to the court why they should not be called as jurors in the trial of this cause. Which said challenge of the said defendants to the said array of jurors was by the court overruled; to which ruling and judgment of the court overruling the said challenge of these defendants the said defendants then and there, in open court, excepted, and here now tenders this their bill of exceptions. The defendants having then announced ready for trial, the court then proceeded to impanel a jury from said list, until the said list was exhausted. Then the said defendants prayed the court to have the first name and the
9 names on the list of the regular jurors summoned for the term, and served upon them these defendants, called, which the court

refused; to which ruling of the court, in refusing to have the first name and the names on the list of said regular jury called, the said defendants then and there excepted in open court. The court then, over the objections of these defendants, ordered the marshal to summon another venire of fifty talesmen, and the court then adjourned until the next day, and until the marshal could summon said venire of talesmen so ordered by the court over the objection of these defendants; to which said ruling and order of the court the said defendants then and there in open court excepted. Then, on the 11th day of June, 189 , when the court again convened, the defendants were presented with a list of the names of persons summoned by the said marshal under said last-named order, the same being a list of persons not named in the list of the regular jurors summoned for this *this* term of this court, nor in said second venire served upon these defendants; these defendants then and there excepted to the said list, and challenged the array and the venire then tendered them—

First. Because there is no power or authority vested in this court to order jurors summoned to complete the jury until the venire served upon these defendants have been exhausted or set aside for cause.

Second. Because said jurors were not drawn from a box by the clerk and a jury commissioner, as required by article 800–C of the United States Statutes.

10 Third. Because the court has failed and refused to exhaust the regular venire of regular jurors summoned for the term, as required by law of the State of Texas, in impaneling juries in capital cases.

Fourth. Because the persons summoned by the said marshal, whose names are now furnished these defendants, were not bystanders, and were not summoned by the marshal from the bystanders, but come from distant towns in Red River and Fannin Counties, in said eastern district of Texas, with a few exceptions from Lamar County, Texas, in said district; which exceptions and challenges the court overruled, and forced these defendants, over their objections and protestations, to accept seven jurors out of the list summoned by the marshal under the order of the court aforesaid last made, and so presented to these defendants; to which ruling and judgment of the court in overruling the said exception and challenge of these defendants and forcing these defendants, over their objections and protestations, to accept said seven jurors, as aforesaid, the said defendants then and there in open court excepted, and here now tender this their bill of exceptions.

And be it further remembered, that during the trial of this cause, after the Government and the defendants had announced ready for trial, the defendants C. J. Cook, O. J. Cook, A. M. Donald, J. W. Calvert, Cyrus Frease, John A. Rutter, J. B. Chamberlain, John J. Jackson, J. Lawrence, W. S. Grubb, William O'Connor, and Ed. Bowden were arraigned in open court for the crime of murder, and charged by the bill of indictment in this cause, in these words, as follows:

11 In the name and by the authority of the United States of America.—In the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit.

At a stated term of the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit, begun and held at

Paris, Texas, within and for the district and circuit aforesaid, on the second Monday, the same being the fourteenth day of October, in the year of our Lord eighteen hundred and eighty-nine, and continued by adjournment to and including the thirty-first day of October, in the year of our Lord eighteen hundred and eighty-nine.

EASTERN DISTRICT OF TEXAS, *set.:*

The grand jurors of the United States of America duly elected, impaneled, tried, sworn, and charged to inquire into and due presentment make of offenses against the laws of the United States of America in and for the district and circuit aforesaid, on their oath in said court present: That heretofore, to wit, on the twenty-fifth day of July, in the year of our Lord eighteen hundred and eighty-eight, in that section of the country lying between Kansas and Texas, bounded on the west by New Mexico and extending east to the one-hundredth meridian longitude, commonly called the Neutral Strip, or "No Man's Land," in the Indian Territory, the same being attached to and constituting a part of the eastern judicial district of the State of Texas for judicial purposes, and within the jurisdiction of this court, one Samuel Robinson, and one J. B. Chamberlain, and one J. M. Donald, and one C. E. Cook, and one O. J. Cook, and one J. W. Calvert, and one James Wrigley, and one George B. Teames, and one Cyrus Frease, and one William O'Connor, and one John J. Jackson, and J. Lawrence, and one George T. Smith, and one Ed. Bowden, and one Frank Balsley, and one J. B. Izor, and one Sylvester Maher, jr., and one George Monhead, and one F. G. Brewer, and one W. S. Grubb, and one John A. Rutter, and one B. E. Stehle, and one Harry Lee, and one Charles Calvert, and one A. Noble, and one John Childers, and one L. J. Pettijohn, and one J. E. Feasor, and one Grant Humphreys, and one P. H. Furguson, whose names are to the grand jurors otherwise unknown, did, unlawfully, feloniously, and with their malice aforethought, and the malice aforethought of each of them, and with certain deadly weapons, to wit, certain guns and pistols, the same being then and there loaded and charged with gunpowder and leaden balls, said deadly weapons being then and there held in the hands of the persons aforesaid, make an assault in and upon the body of one John M. Cross, and did then and there shoot off and discharge, the contents of said guns and pistols, at, in, and upon and against the body of the said John M. Cross, inflicting thereon two mortal wounds; the said John M. Cross then and there did languish, and languishing did die. And so the grand jurors aforesaid, upon their oath aforesaid, do present and say that the said Samuel Robinson, and one J. B. Chamberlain, and A. M. Donald, C. E. Cook, and O. J. Cook, J. W. Calvert, James Wrigley, Cyrus Frease, William O'Connor, John J. Jackson, George B. Teames, J. Lawrence, George T. Smith, and Ed. Bowden, Frank Balsley, and J. B. Izor, and Sylvester Maher, jr., George Moehead, F. G. Brewer, W. S. Grubb, and John A. Rutter, and B. E. Stehle, and Harry Lee, Charles Calvert, A. Noble, and John Childers, L. J. Pettijohn, and J. E. Feasor, and Grant Humphreys, and P. H. Furguson, all acting together, did, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and eighty-eight, at the place aforesaid, with the said deadly weapons, then and there held and used, and discharged as aforesaid unlawfully, feloni-

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ously, and with their malice aforethought, and with the malice aforethought of each of them, kill and murder the said John M. Cross; contrary to the form of the statutes of the United States of America, and against the peace and dignity of the United States of America.

E. M. ALEXANDER,
Foreman Grand Jury.
J. E. MCCOMB,
U. S. Atty. E. D. T.

(Indorsed:) The United States vs. Samuel Robinson et al. 29 others. Murder. A true bill. E. M. Alexander, foreman of grand jury.

"Witnesses: Herbert Tonney, Flora, Ill.; S. N. Wood, Woods-
13 dale, Kansas; E. P. Ludwick, Woodsdale, Kansas; N. R. Hensley, Woodsdale, Kansas; R. R. Wilson, Barber County, Kansas; S. S. Wilber, Wichita, Kansas; H. Cann, sheriff Stevens County, Hugoton, Kansas; A. P. Ridenout, ex-sheriff Stevens County, Moscow Kansas; Merritt Hughes, Kingfisher, I. T.; A. P. Haws, McClellan Haws, Voorhies, Kansas; Keen Haws, these are the haymakers who were eyewitnesses to the killing; Dave Scott, W. B. Reed, Optima, No Man's Land, I. T.; C. E. Short, Hennesy Flats, I. T.; Victor McCrary, Clifton Hill, Mo.; C. A. Bicket, Veranda, Mo.; Geo. S. Majors, Eldorado, Mo. The last three named were at Hugoton proving up, the next day after the killing, when some parties there admitted they did the killing.

"Filed in open court, October 31, 1889.

H. H. KIRKPATRICK,
Clerk.

And the said defendants having heard the same read to them, each plead for himself and severally from the others, "Not guilty." And after the jury had been impaneled and sworn, the said bill of indictment and the plea of the said defendants were read to the jury.

And be it further remembered, that after the reading of the said bill of indictment to the jury, and the defendants and each of them having pleaded "Not guilty" thereto, the Government and the defendants introduced their evidence in this case which was and is as follows:

[Here followed the whole evidence in the case, which will be inserted in the record.]

"A."

Be it remembered that on the trial of the defendants arranged in the above-entitled cause the Government introduced one Taylor Fox as a witness, who testified in response to questions as follows:

Mr. MCCOMB, Govt. counsel:

Q. What is your name?
Ans. Taylor Fox.
Q. Where do you live?
Ans. Woodsdale, Stevens county, Kansas.
Q. Do you know John Cross?
Ans. Yes, sir.
Q. Is he alive or dead?

Ans. He is dead.

Q. Did you see him after he was dead?

Ans. Yes, sir.

14 Q. Where did you first see him after he was dead?

A. At Voorhies.

Q. How did you come to see him in Voorhies?

A. They sent me after him.

Q. Where from?

A. Woodsdale.

Q. Who went with you?

A. Mr. Bolen, Jack Houck, and Charley Reynolds, and a man named Furguson; I belive there were six of us.

Q. How were you traveling?

A. In wagons.

Q. You say they sent up to you to go down and get them?

A. Yes, sir.

Q. When you got to Voorhies where were the bodies?

A. In a stable.

Q. How many were there?

A. Four.

Q. In whose stable were they?

A. Mr. Wright's, I believe.

Q. Is he a witness here?

A. Yes, sir.

Q. Who had charge of them?

A. I couldn't say; we just drove up there and loaded them in.

Q What was the condition of the bodies when you saw them?

A. They were all laying covered up with a wagon sheet—pretty bad condition.

Q. Had decomposition set in?

A. Yes, sir; they had begun to turn black.

Q. Were they still dressed as they went away?

A. Yes, sir.

Q. What time did you arrive at Voorhies?

A. About between 12 and 11 o'clock that night.

Q. In going from Woodsdale to Voorhies, what direction did you go?

A. We went straight south.

Q. I will ask you to state whether or not there is a road straight south form Woodsdale to Voorhies.

A. Yes, sir; it angles a little bit west before we get there.

Q. Is it nearly a straight direction?

A. Yes, sir.

Q. How far is it from Woodsdale to Voorhies?

A. About sixteen miles.

Q. Is Hugoton on the line of that road? That road running south—is Hugoton on that line of road?

A. No, sir.

Q. In going from Woodsdale to Voorhies by Hugoton, how is it—farther or nearer to go straight?

A. It is farther.

Q. How much further?

A. About four miles and a half or five miles; or two and a half out of the way of going, making about five miles in going to Hugoton.

Q. You say you went down. You did not go by Hugoton?

A. Yes, sir.

15 Q. Was there a road running south from Woodsdale to Hugoton? I mean from Woodsdale to Voorhies. Is that as good as the one by Hugoton?

A. It is a better road; not as much sand.

Q. What time was it when you got to Voorhies?

A. Between 11 and 12 o'clock that night.

Q. How long did you stay there?

A. We wasn't there over 25 minutes.

Q. When you got there what did you do with the bodies?

A. Laid them in the wagons.

Q. What did you do?

A. Come back through Hugoton to take them to Woodsdale.

Q. Who was with you when you came back by Hugoton?

A. A man named Spoon; I can not speak the other man's name.

Q. Where did he live?

A. He lived at Hugoton at that time.

Q Where did Spoon live?

A. He lived a little out of Hugoton.

Q. He was in Hugoton when you went out?

A. Yes, sir.

Q. How many men went with you out?

A. Those of us and the two that went from Hugoton with us down there.

Q. I believe you said that you went from Woodsdale to Voorhies; you didn't go, though?

A. Well, mind they took us back to Hugoton.

(The defendants then objected to all of this evidence of the witness—

First. Because none of these defendants were present, and they had no knowledge of what others were doing.

Second. Because this was after the killing of Cross (the deceased), and was irrelevant and immaterial.

The court overruled the objection of the defendants to said evidence, and permitted the counsel for the Government to continue the examination and refused to exclude said testimony; to which ruling of the court the defendants, here now on trial, then and there in open court excepted.)

The counsel for the Government then said to the witness:

Q. I understood you to say that was the most direct route and the best road?

A. Yes, sir.

16 Q. Now I will ask you why didn't you go the most direct route and the best road? Why you went—if that was the most direct route and the best road. I will ask you why it is you did not take that route? Why turn and go another way?

(To which question the defendants' counsel objected, because the same was irrelevant, incompetent, and immaterial, and because none of these defendants were present and knew what was being done. To which the court replied: "I can not see—I do not know what his answer will be. He might say——")

Mr. HODGES (defendants' counsel). "It is proper to ask him if defendants had anything to do with it."

COUNSEL FOR GOVERNMENT: "I want to ask him what it was; if he says it was caused by somebody not the defendants, I do not want it. I submit to your honor that I am certainly following the rule."

The COURT. "The question is proper. I may have to control it."

COUNSEL FOR THE DEFENDANTS. "It is simply getting indirectly what they can not get directly. If the witness answers, it will go to the jury. It is always best to exclude these improper answers before they go to the jury. Unless the defendants prevented them from going, it is irrelevant, immaterial, and incompetent."

By the COURT. "I believe that is right. I will restrict this to whether they were interfered with by these defendants or any one of these defendants here, because I can not tell what the effect of an answer of that kind might have upon the minds of the jury. I can not tell what the answer will be, of course. If these defendants had nothing to do with it, they can not be bound by it and should not be affected by it. The question is perfectly proper, but the effect might not be proper. Go ahead; if it is necessary I shall control it."

(To which rulings of the court the said defendants here now on trial in open court excepted then and there.)

The counsel for the Government then resumed the examination of the witness TAYLOR FOX, as follows:

Question. Was it your intention to go directly from Woodsdale
17 to Voorhies? Is that where you started to go?

Ans. Yes, sir; we started that way.

Q. Did you go that way?

A. We went that way until we was checked and taken back to Hugoton.

(To which questions and answers the defendants' counsel objected, because the same were irrelevant, immaterial, and incompetent, and because neither of these defendants was present and knew what was being done; which objections were by the court overruled, and defendants then and there in open court excepted.)

Counsel for the Government then resumed the examination of the witness as follows, to wit:

Q. Did you do that of your own will?

A. No, sir.

Q. Who was it took you back there?

Mr. HODGES (counsel for defendants, objecting). "Mr. McComb ought certainly to ask if these defendants had anything to do with that."

The COURT. "I think the proper way would be to ask if the defendants checked them."

Mr. MCCOMB (Government's counsel). "I am certainly asking him a proper question. If I ask the witness if the defendants were there, counsel upon the other side would jump up and object to it as being leading. I just simply wish to ask the witness who was there and let the witness state."

The COURT. "The answer can not possibly affect these defendants unless they were present, or unless they procured this act to be done. It is just this about it: If either of these defendants were there and any took part in that, of course it is material; if they were not there, it does not bind

them. Of course, I do not know anything about what the testimony will be. It seems to me that the better way would be to ascertain whether or not either of these defendants had anything to do with the interruption of the route. The question is perfectly right; you have a perfect right to ask it, but, at the same time, I feel it my duty——"

Mr. McCOMB (interrupting). "I will ask the question in another way."

18 (To the witness:) Q. Do you know, or did you know, the parties that prevented you from going—took you back from Hugoton?

A. Yes, sir.

Q. Do you know the defendants that are charged in this indictment?

A. I know all of them but one or two.

Q. There is one or two that you do not know?

A. Yes, sir.

Q. Do you know the names of the parties that took you back to Hugoton and prevented you from going in a straight line?

A. Yes, sir.

Q. Do you know their names?

A. Yes, sir.

Mr. HODGES (defendants' counsel, objecting). "Does your honor propose to let counsel simply ride over the rulings of this court?"

The COURT. "So far counsel has conformed to the rule."

(To which ruling of the court defendants' counsel then and there in open court excepted.)

Q. You say you do know the parties who took you back to Hugoton?

A. Yes, sir.

Q. You say you do not know all of the defendants?

A. There is one or two that I do not know.

Q. I will ask you how far you had gone towards Voorhies when you were taken—when you were taken back?

A. We were in five miles of Voorhies when we were turned back.

Q. Were any of the defendants who are here on trial in the crowd that took you back to Hugoton?

A. No, sir.

Q. Were any of them in the crowd that took you back?

A. No, sir.

(Here the defendants again objected to all this evidence on the grounds that it was after the alleged murder was committed and not in the presence of or within the knowledge of either of the defendants on trial, and because the same is irrelevant, immaterial, and incompetent; which objection was by the court overruled, and the said defendants then and there in open court excepted.)

Question by Government counsel. When you got to Hugoton what time did you get there?

A. Just about sundown—a little after.

Q. I will ask you if there was any warrant served on you to take you up there?

A. No, sir.

19 Q. The parties didn't claim to be officers who took you?

A. No, sir.

Q. It was about sundown when you got there?

A. Yes, sir.

Q. How long did you stay in Hugoton?

A. We stayed there until they got everything arranged to send us back after the bodies.

Q. When you went back after the bodies did they send anybody with you?

A. Yes, sir; two men.

Q. Were any of them the defendants?

A. Not that I know of.

Q. When you got to Hugoton whom did you meet?

A. Well, we met about one hundred and fifty of them; looked to me about that many—a crowd of about one hundred and fifty.

Q. Were they armed, or not?

A. Yes, sir; all kinds of guns, and in vehicles, several kinds, and on foot.

Q. Where were they?

A. They were out about 200 yards.

Q. What direction from the town were they?

A. Southeast.

Q. What direction were you traveling as you went into Hugoton?

A. Traveling to the northwest.

Q. You were traveling in the northwest; they were out southeast of town; state whether or not they were on the line of road you were traveling.

A. Yes, sir.

Q. You say you met them out about how far from town?

A. They were probably 100 or 150 yards.

Q. Did you stay there?

A. Yes, sir.

Q. What was done?

A. There was not anything done; they told us to go; they asked us where we were going first.

Mr. HODGES (defendants' counsel objecting to the court). "Do you think that is in compliance with your honor's ruling?"

The COURT. "I do not think that it is admissible against these defendants, unless you show connection with these defendants."

Mr. MCCOMB (Government's counsel). "That is what I propose to do."

Mr. BRADFORD (defendants' counsel). "We desire to save our exceptions to every question of this kind as incompetent in connection with the evidence. We want the court to understand us. This evidence has gone in over our objection, and it is, so far as we understand it to be, incompetent, irrelevant, and immaterial. Now, then, if the defendants are not shown to have any connection with their being taken to Hugoton, then it should be stricken out from the jury."

The COURT. "I understand your objection. Unless this evidence is connected in some legitimate and proper manner, it will all be taken from the jury; they will be instructed to not consider this testimony if the connection is not made. Go ahead."

(To which said ruling of the court the said defendants then and there in open court excepted.)

The counsel for the Government then resumed the examination of the witness as follows:

Q. Did you recognize any of the parties that met you out there and stopped you?

A. No, sir.

Q. I will ask you to state whether or not any of the defendants were there in that party?

A. None that I know of that night.

Q. Do you know who all were there?

A. No, sir; I did not know them all.

Q. I will ask you to state if, after you got to Hugoton, you saw any of these defendants there?

A. Yes, sir.

Q. Who did you see after you got to Hugoton?

A. You did not ask me exactly right to tell it. In the first place they took us down to the stable, and that Wheeler came down there with a double-barreled shot-gun and ordered me out of the stable. He took me up there to O'Connor's office, and took me in the back room, and O'Connor and Donald was there.

Q. I believe that you stated that you drove the wagon to the livery stable; whose livery stable was that—or you were taken to a livery stable?

A. It was called Jack Robertson's, I believe.

Q. When you got there what was done with you?

A. I was ordered out of the wagon and took to O'Connor's and Donald's office.

Q. Who ordered you out?

A. A man named Wheeler.

Q. Did you go?

A. Yes, sir; I went.

Q. Why did you go?

A. Because I had to.

Q. Why did you "had to?"

A. Because he had a double-barreled shot-gun, both barrels of it cocked.

21 Q. What was his language?

A. He says "Get out, and go along with me."

Q. Where did he go?

A. He went to O'Connor's and Donald's office; he took me in that back way.

Q. What about that back way—how does that office front?

A. It fronts to the west.

Q. Then you went in the back way?

A. Yes, sir; we went in the east door—the back door.

Q. What kind of a building is it—wooden, or what?

A. It is a wooden building.

Q. One or two stories high?

A. One story.

Q. Any partition in it?

A. Yes, sir.

Q. You went in the back way?
A. Yes, sir.
Q. Did you stop in the back room?
A. Yes, sir.
Q. Was the front door open?
A. I don't know.
Q. Was there a partition door?
A. Yes, sir.
Q. Was it open or closed?
A. It was closed.
Q. Did this man Wheeler go in with you?
A. Yes, sir.
Q. When you got in there who were in there?
A. Mr. O'Connor and Donald, here.
Q. These two gentlemen here?
A. Yes, sir.
Q. Two of these defendants?
A. Yes, sir.

Q. Did you have any conversation? What was done and said in there?

A. They took me in there. They wanted to know where Wood was, and Ed. Short, and they wanted to know where they were, and I told them I didn't know; and they wanted to know if I was willing to give them up; and I told them I wasn't their guardian—that I had nothing to do with them, and they said just give them up and we would join hands; they would help us and we would make a good town. That man O'Connor told me that.

Q. Did he say what he wanted with them?
A. They didn't say for a good little bit what they were going to do.
Q. Did they ever say?

A. Yes, sir; they said they was going to kill them, and they allowed to watch the road day and night until they got them.

Q. What further occurred there? Just tell all that occurred.

A. Then they told me that they had 25 or 30 men down in No Man's Land, and they had better send a man down to Voorhies with us, that these men might run across us and kill us.

Q. They said they would send a man down to Voorhies; that these men if they came across you they would kill you?

A. Yes, sir.

22 Q. Was there any other conversation there? Where was Wheeler during this time?

A. He was standing in the room.
Q. Did he have anything?
A. He had a shot-gun.
Q. How long did he stay in there?

A. Well, we got in town just about sundown, and they took me there as quick as I could get in and get out of the wagon, and I suppose we were in there from about half an hour to three-quarters of an hour—just about half an hour or three-quarters of an hour—and then when I left there he marched me out with a shot-gun, and took me down to the hotel, and then eft me. I don't know where he went to.

Q. How far was it to the hotel?
A. About half of a block.
Q. Did you see Mr. Calvert there at the office—there in town?
A. I saw Mr. Calvert as they were marching me. I saw Mr. Calvert talking to Mr. Bolen.
Q. Is Calvert here?
A. Yes, sir.
Q. Where is he?
A. Right there [pointing].
Q. One of the defendants?
A. Yes, sir.
Q. Did you hear anything he said to Bolen?
A. I heard him say that we had four men to haul; we had just got our hand in hauling—that we had four men to haul.
Q. Did he say what kind of men?
A. No; I passed right on; I just heard him say we had four men. He was talking to Bolen. I looked around at him, and Wheeler said, "Come right on."
Q. How many men were you going to haul then?
A. We were supposed to haul five.
Q. He said you would have four more to haul?
A. Yes, sir.
Q. You say that they told you in there that they would send an escort down there with you to Voorhies; did you have an escort down there?
A. Yes, sir; from Hugoton we had, down to Voorhies.
Q. Who escorted you down there?
A. A man named Spoon, and another—I can not think of it; I know it as well as I know my own; I can not think of it.
Q. State whether or not the escort that escorted you down to Voorhies was the same one that brought you back to Hugoton.
A. Yes, sir.
Q. You say they escorted you down to Voorhies?
A. Yes, sir.
Q. Are they the men you first met as you went to Voorhies, or not?
A. No, sir.
Q. Wasn't the ones you first met?
A. No, sir; not them that took us back.
23 Q. Who was it that first met you then and took you up to Hugoton? Did you know them?
A. Yes, sir.
Q. Who were they?
A. That was Feasor. He overtook us and took us back as far as Spoon's; he was a brother of this Spoon that took us down to Voorhies.
Q. What was Feasor's given name?
A. I don't recollect what his given name was.
Q. I will ask you to state whether or not he was one of the men who was indicted and afterwards dismissed in this case.
A. Yes, sir.
Q. He is the same party?
A. Yes, sir.
Q. How many wagons did you say that you had there that day?

A. We had three.

Q. Who were with the wagons?

A. Jack Bolen, Furguson, and Butterfield—he is dead now—and two others.

Q. Are the rest living?

A. Yes, sir.

Q. Were you all armed?

A. We didn't have any guns at all.

Q. Did you have any pistol?

A. No, sir; we didn't have any pistols of any kind.

Q. What did you have in your wagon?

A. Ice.

Q. What did you have ice for?

A. To preserve the bodies.

Q. Where was the first time you saw this man Feasor that stopped you—took you back to Hugoton?

A. In about five miles of Voorhies; when I looked back I heard him holler.

Mr. HODGES (defendants' counsel, objecting): "I do not think that this is proper; there is no proof that either of these defendants had any knowledge of his being out there at all—none in the world. Of course I do not know what they are going to prove, but I submit that whatever any man did out there is not legitimate."

The COURT. "I will hear it, and if necessary will control it."

Q. Just state how you were stopped down there, and what occurred there.

A. The first I seen of Feasor I looked around and he was hollering, and he shot twice.

Q. What did he have? What did he shoot with?

A. He shot with a revolver.

Q. How far was he from you when he shot?

A. He was, when he was first seen by me, about 400 yards—he didn't shoot until he got about 300 yards of us—I mean a quarter of a mile when I first saw him. The shot came right close to our wagon, and in the dirt by the side of our wagon.

Q. What did you do?

A. We stopped.

24 Q. State what occured—how they took you back.

A. He wanted to know what we had in our wagon, and we told him ice. He wanted to know where we was going, and I told him. He says, "You aint got any dead bodies at all;" he said they had the dead bodies down there; it was their men that were dead. He made us turn around. The other two wagons were about forty rods ahead of us. He went on and got them and fetched them back, and told me to follow him up with the other parties, and he turned us around and took us back to Hugoton. I was taken from there into the office of Mr. O'Connor, and he said he knew very well that the men who were dead down there——

Q. How many men were with Feasor down there?

Mr. O'CONNOR. "Let him tell what he started."

Mr. MCCOMB. "Go on."

The WITNESS. He said he knowed very well—the drunk fool—he knowed what he was going for, and might have let us go on, and he up and gave us a talk, and told me what I have already told.

Q. How many men were with Feasor?

A. He was out there by himself. This Wheeler was out there with him, and he was trying to get him to go back, and he stopped right under the hill, I suppose a quarter of a mile away; as quick as he turned us around they made back to town——

Q. When Feasor came up to you, what did he have?

A. He had a revolver.

Q. Where did he have it?

A. In his hands.

Q. What did he do with it?

A. He shot it off. Going back to the other wagon, he emptied his revolver. When he came back to me he was taking cartridges out of his vest pocket and filling it up.

Q. How long did you say you stayed in Hugoton?

A. We got in there about sundown, I think it was between 7 and 8 o'clock when we left there. It was after dark a good bit.

Q. What time did you arrive at Voorhies?

A. Between 11 and 12 o'clock.

Q. About what time of day was it when they turned you, when you were going to Hugoton?

A. It was between 4 and 5 o'clock.

Q. You say you were within about five miles of the town of Voorhies?

A. Yes, sir.

Q. How far were you then from Hugoton?

A. About seven or eight miles.

Q. What direction from Hugoton were you?

A. Northwest.

25 Q. Hugoton was northwest?

A. Yes, sir.

Q. What direction was Voorhies from you?

A. Southeast from us.

Q. Then they turned you back in an opposite direction?

A. Yes, sir.

Q. Now, when you returned with the bodies, which way did you return?

A. Through Hugoton.

Q. Why did you return through Hugoton?

A. We had to go through that way; they sent men along with us to take us back that way.

Q. Your crowd was still with you?

A. Yes, sir; when we got back to Hugoton with the bodies this crowd was there. They all gathered around, and all wanted to know which wagon had Bob Hubbard in.

Q. Did you see any of the defendants there?

A. Yes, sir; I saw Mr. Calvert walking along; he walked up to the wagon and walked right away.

Q. About how many persons, as well as you recollect, came to look at the bodies there?

A. Between 50 and 75 persons.

Q. What time of day or night was it when you got back to Hugoton with the bodies?

A. It was along close to about 4 o'clock; it was just daylight when we got to Woodsdale; it was about 4 o'clock in the morning, I think.

Q. How long did you stay in Hugoton as you returned with the bodies?

A. They kept us about a half of an hour, I suppose.

Q. From there on home did you have any guard?

A. No, sir; they turned us loose there.

Q. Was there an inquest held over the bodies, do you know, anywhere?

A. Yes, sir; there was one at Woodsdale.

Q. Do you know who composed the jury of inquest?

A. No, sir, I do not; I could not say.

Q. Were you there when it was held?

A. No, sir.

Q. Did you examine these bodies?

A. I did when I uncovered them at Voorhies.

Q. Did you examine them to see how many wounds were on them?

A. As well as I can recollect now, Cross had about three holes shot in him. [Witness locates on his person where he saw holes in the body of Cross.] One ball made both of these [indicating].

Q. That you do not know?

A. No, sir; Hubbard, he had two, and Eaton had two.

Q. How were the holes in Hubbard?

A. Right here some place [showing in his person].

26 Q. What kind of holes were they?

A. About 45.

Q. You found two holes in Hubbard and two in Eaton?

A. Yes, sir; and two in Wilcox—there was four of them.

Q. While in the office with Mr. O'Connor and Donald, I will ask you to state whether or not they said anything about going back that way, whether there was anything said about that; if so, what was it?

A. Nothing more than what I have told you. Then they said they had twenty-five or thirty men down there; they were expecting them home at any time or minute, and if they run across us they would kill us; that is all they spoke about.

Q. Was anything said in there by any of them as to who was killed, or anything of that sort?

A. No, sir; there was no names mentioned; simply had twenty-five or thirty men down there that killed these men; that they were expecting them home at any time, and that they would kill us if they met us, and they would send these two men down with us as escorts.

Q. Did either one of them state in there who it was killed these men down there?

A. No, sir.

Q. They didn't state who it was?

A. No, sir; not to me.

Q. I will ask you to state what they did say about the killing of these men, if anything—about the killing of these men down there?

A. They said they had about 25 or 30 men down there that killed these

men; and they were expecting them home at any time or minute, and if they ran across us they would kill us, and so two men would go down with us.

Q. Do you know whether Robinson and Cook and that party had returned at that time to Hugoton—did you know by that?

A. They had not returned at that time.

All this evidence was admitted over the objections of these defendants; defendants objected to that part that details the conversation with O'Conner and Donald, because it was not about the alleged offense, and was only threats against other persons and after the alleged offense had been committed, and was in no way connected with the charge against these defendants. These objections, and the other objections of these defendants
27 herein named, were each and all of them overruled by the court, and the above evidence of the witness, Taylor Fox, was permitted to go the jury with the instruction by the court that this evidence was admitted only as to the defendants, William O'Conner and A. M. Donald. To all of which said defendants in open court then and there at the time excepted, and here now tenders this bill of exceptions and prays that the same may be signed and made a part of the record, which is accordingly done and so ordered.

Be it further remembered, that on the trial of this cause the Government introduced and had sworn one Le Doux, who testified that he was in Hugoton, Kansas, two days after the killing of Sheriff Cross and party, and had a talk with Charles Cook, O'Connor, Davis, Chas. Moore, Chamberlain, and some others; he did not hear either say who did the killing. The talk was in the rear part of O'Connor's law office. A stranger called him in. They said to witness: "You people at Voorhies will have to stop feeding the people from Woodsdale and their horses when they pass; if you don't we'll come down there and clean up your town and run you out." The defendants objected to the introduction of this testimony, because it was a declaration of only part of these defendants, made after the killing, not in the hearing of the other defendants; was not relevant to the issue being tried in this case, and was at most but a conditional threat made by some of the defendants and other parties of Hugoton against the people of Voorhies; which objections were overruled by the court, and the testimony was permitted to go the jury, as stated, with the instruction by the court to the jury that such evidence was only admissible as to A. M. Donald and William O'Connor, who were present, and could not affect the defendants not present; to which ruling of the court the defendants then and there excepted.

28 And be it further remembered, that on the trial of this cause the counsel for the Government asked the defendant, C. E. Cook, on his cross-examination as a witness, if he did not send a communication to the Hutchinson News shortly after the killing of the deceased, John M. Cross, signed by him, C. E. Cook, in which he stated that he was present when John M. Cross and three others were killed and Tonney wounded, and that as he, Cook and party, approached the hay-stacks, they were fired upon from the stacks by John M. Cross and party, and that thereupon a fight ensued, and John M. Cross, Bob Hubbard, T. Eaton, and a man by the name of Wilcox, was killed, and Tonney

wounded; to which the witness, C E. Cook, answered that he did not. The Government, when introducing its rebuttal testimony, introduced and had sworn as a witness for the Government one Lambert Willsteap, when the following questions were asked the said witness, to which he gave the following answers, to wit:

COUNSEL FOR GOVERNMENT:

Q. What is your name?
A. Lambert Willsteap.
Q. Where do you live?
A. Liberal, Seward County, Kansas.
Q. How long have you lived there?
A. Little over two years.
Q. Were you there in 1888?
A. Yes, sir.
Q. What business were you engaged in?
A. I published a weekly newspaper.
Q. What is the name of it?
A. Liberal Leader.
Q. Do you know C. E. Cook?
A. I am only slightly acquainted with him.
Q. Was he an editor in 1888?
A. Yes, sir.
Q. Of what paper?
A. Of the Hugoton Herald.
Q. You say you have a slight acquaintance with him?
A. Yes, sir.
Q. Did you receive any correspondence or communication from him to your paper at the time of that killing?
A. At the time of the killing I wrote to him to give me a statement.
29 Q. To give you a statement?
A. Yes, sir.
Q. Did he give you a statement?
A. Yes, sir.
Q. Signed by him?
A. Yes, sir.
Q. What did you do with the statement?
A. I telegraphed a copy of it to the Associated Press, and published it also in my paper.
Q. That is the statement he gave you?
A. Yes, sir.
Q. You published it in the Liberal Leader?
A. Yes, sir.
Q I will ask you to look at that [handing witness a newspaper file]—at this article?
A. That is the statement, sir.
Q. You say you got the statement from C. E. Cook?
A. Yes, sir.
Q. What paper is this?
A. This is the Liberal Leader.

Q. What issue is it?
A. I believe it is August 2d.
Q. Look and see.
A. Yes, August 2d, 1888, vol. 1, No. 54.

Cross-examination.

COUNSEL FOR THE DEFENSE:

Q. Did you ever know C. E. Cook?
A. I am not much acquainted with him.
Q. I will ask you where you ever knew him?
A. I saw him in Liberal once or twice.
Q. Did you ever see him before this occurred?
A. I could not say whether I did or not.
Q. Did you ever know anything about his handwriting?
A. No, sir.
Q. Where is that original document you had?
A. I did not save it.
Q. Where did you get it from?
A. If I am not mistaken, I got it by mail.
Q. How did you get any document by mail from him?
A. I might have got it by courier; I am not positive.
Q. Do you not know another man gave you that document, and not C. E. Cook?
A. It was signed C. E. Cook.
Q. Do you not know that you never received an answer to the letter you wrote Cook?
A. I did receive an answer.
Q. By mail?
A. I either got it by mail or by courier.
Q. I will ask you if another man did not give you this letter or this document you published?
A. It is possible I got it by courier.
Q. If another man or a courier gave you this letter, how do you know you ever received an answer from C. E. Cook? You think it possible that another man gave it to you?
A. Yes, sir.
30 Q. You do not know that C. E. Cook ever saw the document you got, do you, or know that there was such a one in the world?
A. I do not know whether he did or not.
Q. All you know is, the man handed a document signed C. E. Cook, and you published it; that is your best recollection?
A. Yes, sir.

Redirect examination.

COUNSEL FOR GOVERNMENT:

Q. You say you asked him for a statement, and in reply you received this?
A. Yes, sir.
Q. And published it?

A. Yes, sir.

Q. It was signed C. E. Cook?

A. Yes, sir.

Q. This is a correct copy of the letter you received?

A. Yes, sir; to the best of my knowledge.

Q. I will ask you if a copy of it also was not sent to the Hugoton Herald, and this letter published in the Hugoton Herald?

A. I do not remember whether it was or not.

Q. You say you hunted for the original article and could not find it?

A. Yes, sir; I looked all over for it.

Q. You were asked to bring it here?

A. Yes, sir; I looked in every corner and could not find it; I am very sorry I could not find it.

COUNSEL FOR GOVERNMENT (to the court). "I now propose to offer in evidence that part of this to which the attention of the defendant was called while on the stand, by way of impeachment. We asked him if he did not sign a statement and send it to the Liberal Leader, sign it C. E. Cook, and he said he did not."

Mr. BRADFORD (for the defense). "That is objected to as incompetent, irrelevant, and immaterial."

Mr. HODGES (for the defense). "A further objection is, that this witness does not know that C. E. Cook ever saw that article, and he admits that probably another man handed him; that did not get it by mail, but by courier."

The COURT. "I will ask Mr. Willsteap a few questions."

The COURT:

Q. What is your best recollection as to how you received this communication, whether by mail or courier?

A. I am not positive whether I received it by mail or courier; I received it, I know.

Q. Have you any distinct recollection as to whether you received it by mail or courier? What is your best recollection?

A. I am under the impression I received it by mail.

31 Mr. McCOMB (Government's counsel) to witness:

Q. In due course of mail?

A. Yes, sir.

Mr. HODGES (for defense) to witness:

Q. Did you not state, in answer to my question, that your best recollection was, you received that by courier?

A. No, sir; I said I was not sure.

Q. How came you to think it possible you received it by courier?

A. Why, it would be most likely, I think, to receive it by mail; it might be possible I received it by courier, because three was a good deal of intercourse between the towns at that time; people from Stevens County—some of them—were in Liberal most every day, and so it might have been easy to get it by courier; that is—

Q. When did you receive that?

A. I cannot tell the exact date, but I received it two or three days after that, after we received the news of the occurrence. I am not positive.

Q. Then you had written to Cook and got an answer back in two or three days after you heard it?

A. I think that is possible. You see, at that time I was acting as procurer of news; I had no interest at all in the matter, otherwise I would have taken good care to have the dates.

Q. What did you do with the original?

A. I must have thrown it away, or burned it up.

Q. Did anybody ever see it but you?

A. My boy seen it.

Q. You do not know that it ever came from C. E. Cook at all?

A. I could not swear to it.

Q. You could not state on oath that you received it through mail?

A. No, sir.

Mr. McComb (Government counsel):

Q. You had a daily mail between the places down there?

A. Yes, sir.

Q. Your best recollection is you received it by mail? You sent your request by mail, did you not?

A. Yes, sir.

Mr. Hodges (counsel for defense) to the court: "C. E. Cook was asked if he did not send this communication to the Hutchinson News, and not to this witness at all. He said he did not send it to the Hutchinson News. This does not touch the predicate laid at all. There is no predicate laid for this at all. This witness does not know whether he received it by mail or by courier. Then it does not prove anything. We do not know that Cook ever saw it; do not know that Cook ever read it.
32 This witness does not know Cook's handwriting, and does not know whether he ever wrote or read it."

The Court: "The objections are overruled."

Mr. Hodge: "We object to the reading of this newspaper article; it is irrelevant."

The Court: "I do not understand it is the purpose to read the newspaper article, except the particular matters that Cook was asked about. I state to you, gentlemen of the jury, that is not admitted as any other defendant except Cook, and it is not admitted except for the purpose of contradiction as far as C. E. Cook is concerned. It is also admitted as a declaration of what occurred."

Mr. McComb: "I will now read the part referred to: 'They met Robinson in the Strip on his way home, about 11 miles in the Territory, and as it was near midnight, concluded to go into camp at some haystacks near by. When they reached the stacks they were fired upon by parties secreted in the stacks, and a general fusilade began. When it ended, Sheriff Cross, Bob Hubbard, T. Eaton and Wilcox were dead, and a young man by the name of Tonney was seriously wounded. Sam Robinson, of the Hugoton party, was shot through the leg. Any statement different from this is false, as this is written by an eye-witness of the whole proceedings.' That is all we asked him. It is signed, 'Yours truly, C. E. Cook; Saturday, July 21st, 1888.'"

The counsel for the Government then offered in evidence the following part of an article from the Liberal Leader, purporting to be signed C. E. Cook, of date of July 28th, 1888: "They met Robinson in the Strip on his way home, about eleven miles in the Territory, and it was near mid-

night; concluded to go into camp at some haystacks near by. When they reached the stacks they were fired upon by parties secreted in the stacks, and a general fusilade began. When it ended, Sheriff Cross,
33 Bob Hubbard, T. Eaton and Wilcox were dead, and a young man by the name of Tonney was seriously wounded. Sam Robinson, of the Hugoton party, was shot through the leg. Any statement different from this is false, as this is written by an eye-witness of the whole proceeding." Signed, "C. E. Cook."

Which was objected to by the defendants' counsel, on the grounds that it was not admissible to impeach the defendant as a witness, because the proper predicate had not been laid. He was asked if he had not sent the communication to the Hutchinson News, to which he answered he did not. And on the further ground that the Government has not shown that the article was written by C. E. Cook, or signed by him, or that Cook ever saw the article. The witness does not know whether he received the communication by mail, or by the hands of a private party and if by mail its post-mark. No correspondence between C. E. Cook and the witness was put in evidence by the Government, nor was it shown that the correspondence between them continued. All of which objections were overruled by the court, and the evidence admitted, and defendants then and there excepted.

Be it further remembered, that on the trial of this cause, on the cross-examination of David Scott, a witness for defendants, the counsel for the Government asked the said witness if he did not, shortly after the killing, on the road home from Hugoton, offer Keen Hawes two hundred dollars to take a trip to Kentucky, and not testify against these defendants; to which witness answered, "I did not." He was then asked by the counsel for the Government if he did not tell Keen Hawes in Paris, since
34 their arrival here as witnesses, that the defendants would give him that amount to leave or to testify for them. He answered, "I did not." He was then asked by the Government's counsel, "Did you not, after this time in Paris, on the day he testified, tell Keen Hawes that you had two hundred dollars, or could get it from the defendants?" to which he answered, "I did not." After these defendants closed their testimony the Government recalled Keen Hawes as a witness in rebuttal, as a witness to impeach Dave Scott, a witness for the defendants, and proved, over the objections of these defendants, that the witness did have the conversations to which Scott's attention had been called, and that the witness David Scott said in substance what he was asked on the stand if he did not say. The defendants, by their counsel, objected to this evidence, because it was not a material matter as to what the witness David Scott said. And the defendants were not bound by what any one said not in their presence; that what Scott may have said to Keen Hawes is hearsay evidence, and not admissible, and that the matter upon which the Government is trying to impeach the witness Scott was brought out by the counsel for the Government on cross-examination of the witness, and not in response to, or about, or in any way connected with, what said Scott had testified to on his direct examination. The objections of these defendants to this said testimony was by the court overruled, and the said witness Keen Hawes permitted to so testify. To which ruling of the court in overruling the objections
35 of said defendants to the said testimony the defendants here now on trial, in open court, excepted.

On cross-examination by defendants' counsel, the witness, Keen Hawes, was asked if he did not write a letter to C. E. Cook demanding money, to which the witness answered, over the objection of the Government counsel, "Yes; I wrote it because C. E. Cook, in McPherson, Kansas, last March, told me, in presence of A. M. Donald, at the hotel, that if I would come to Paris and testify for the defendants he would give me a horse, and that he would see that defendant Chamberlain would give me another." After the Government closed its rebutting evidence the defendants offered A. M. Donald as a witness to prove that no such conversation and agreement ever took place between the witness Keen Hawes and C. E. Cook, in his presence, as that detailed by witness Keen Hawes. To the introduction of which evidence the counsel for the Government objected, because the same was not in rebuttal; which objection was by the court sustained, and the witness, A. M. Donald, was not permitted to testify; to which ruling of the court in sustaining the said objection and not permitting the defendants to introduce said evidence, the said defendants here now on trial then and there excepted in open court. The defendants then offered C. E. Cook to prove that he had never made the witness Keen Hawes any offer in McPherson, Kansas, or elsewhere, or agreed to pay him any consideration to leave, or to come to Paris to testify in behalf of the defendants in this case; to the introduction of which the counsel for the Government objected, because the same was not in
36 rebuttal; which objection was by the court sustained and said witness C. E. Cook not permitted to testify. To all which said rulings of the court in overruling the objection of these defendants to the testimony of the witness Keen Hawes and permitting him to so testify, and in sustaining the objections of the counsel for the Government to the evidence of the witnesses A. M. Donald and C. E. Cook, the said defendants here now on trial then and there in open court excepted.

[This bill of exceptions is allowed with the following explanation, to wit: When the witness for defendants, Scott, was on the stand, the counsel for the Government asked him certain questions as a predicate for impeachment. After the defendants had closed, counsel for the Government called the witness Keen Hawes, and asked him the questions asked the witness Scott in laying the predicate. On cross-examination, the counsel for the defendants, over the objection of Government's counsel, brought out the matter of the letter to Cook and the conversation with Cook in the presence of Donald, which matter was admitted by the court to be brought out under the peculiar circumstances, but counsel for the defendants were then informed that the examination in regard to such matter could extend no further.]

And be it further remembered, that during the trial of this cause the defendants placed Elmer G. McNealy on the stand, who, being sworn, proved threats by Bob Hubbard (one of the deceased and one of John M. Cross's posse) against the lives of the defendants. The counsel for the Government then asked the witness if he had not written a letter to S. N. Wood, from Liberal, Kansas, asking to be subpœnaed in this
37 case as a witness for the Government. The witness was also shown the letter and the envelope addressed to S. N. Wood, post-marked "Liberal, Kans." To which the witness answered, "I did not; I have wrote no letter to any one about being subpœnaed." When the Govern-

ment by its counsel was offering their evidence in rebuttal, they offered a letter purporting to have been written by Elmer G. McNealy to S. N. Wood, in which the matter of being summoned as a witness was mentioned, and also proved by H. H. Kirkpatrick, an expert, that he believed said letter was the same handwriting as that shown him of McNealy's. The defendants objected to the introducing of the letter as impeaching evidence, because it was an immaterial matter, and a collateral fact, and could not affect these defendants, whether he wrote the letter or not; which objection the court overruled and then permitted the counsel for the Government to read the letter to the jury; to which ruling of the court in overruling the said objection, the said defendants then and there in open court excepted and tender this their bill of exception.

[The above bill of exceptions is allowed, with the following explanation, to wit: Before the letter was offered in evidence, H. H. Kirkpatrick, an expert, was placed on the stand and shown the handwriting of the witness, Elmer G. McNealy, which had been shown him on the stand, and which he admitted he wrote. The expert compared these writings with the letter asked about, and he stated they were written by the same person.]

And be it further remembered, that on the trial of this cause the Government in rebuttal had sworn and put upon the stand, as a witness, S. B. Bradford, ex-attorney-general of Kansas, who was interrogated and testified as follows:

38 By COUNSEL FOR THE GOVERNMENT:

Q. Did you hold any office in the State of Kansas in 1888?

A. Yes, sir.

Q. What office did you hold?

A. Attorney-general.

Q. I will ask you to state to the jury whether or not, under the instructions of the governor, you went to Stevens County, Kansas, to investigate this matter of the killing down there?

A. Yes, sir.

Q. Who went with you?

A. Gen. Meyers met me at Pratt City, in Pratt County, and we went on together, and Capt. Wallace, his adjutant.

Q. Gen. Meyers and Capt. Wallace went with you when you went to make the investgation?

A. Yes, sir; they were not always present.

Q. They were generally present, were they?

A. Yes, sir.

Q. Did you investigate that matter down there?

A. I did to some extent.

Q. Carefully?

A. Yes, sir.

Q. Did you make a report to the governor?

A. Yes, sir.

Q. I will ask you to look at that and examine it [handing witness a paper].

A. Yes, that is the report I made.

Q. That is your signature there?

A. Yes, sir.

Q. You find that correct, do you?
A. Yes, sir, as near as I can ascertain.
Q. I notice some interlineations?
A. I made them; I recognize them as being in my handwriting.
Q. Were there accompanying affidavits to that report?
A. I took some affidavits while I was there.
Q. Did you accompany your report with those?
A. No, sir, not all of them—I do not know—I think not with any; I am not certain I did with any.
Q. I will get you to examine these and see if these are affidavits you took while you were there.
A. [After examining paper handed him:] No, this is nothing I took while I was there. What I took while I was there was simply in pencil or pen.
Q. Did you report it to the governor in pencil and pen?
A. No, sir; I did not.
Q. How did you report it to the governor?
A. I gave it to one of my stenographers, Mr. Charles Flinskey, and had him make a sort of a compilation of the manuscript I took while I was there.
Q. Did you examine them after he made them to see whether or not they were correct?
A. I do not remember whether I did or not.
39 Q. I notice that these are taken before a notary?
A. A part of it may be parts of affidavits that were taken by some other one. There is Dr. Wilbur; I wrote down his affidavit.
Q. Did you write down Herbert Tonney's?
A. Yes, sir; I wrote it down in writing and had him sworn to it.
Q. Did you take the statement there of Herman Kann, constable of Voorhies township?
A. I jotted down something he said.
Q. Did you examine your stenographer's reports?
A. I did not have any stenographer with me.
Q. After he took it and copied it off did you examine it to see whether he did it correctly or not?
A. I can not say.
Q. Did you take a statement there of A. P. Haws?
A. Yes, sir; of the old gentleman Haws.
Q. You took a statement from him?
A. Yes, sir; I took it in pencil.
Q. Did you have it copied?
A. It was copied.
Q. I will ask you to look at that and refresh your memory, and see if that is the statement you took from him.
A. It is not all here that I took down of Mr. Haws's statement, neither did I take down all that Mr. Haws said.
Q. As far as what is there, is that what you took down, to the best of your recollection?
A. Yes, sir; substantially.
Q. Did you take a statement of David Scott?
A. Yes, sir; I did.

Q. Examine that and see if that is the statement you took down of his. [Witness examines a paper handed him by Mr. McComb.]

A. A part of that I recognize.

Q. Do you know who made this report?

A. Charles Flinskey; he was a stenographer in my office. It is not as I wrote it; there are some things left out.

Q. In other words, it is not as full as you wrote it. Is that the way? What is here, did you write that?

A. I cannot say as I did, but I suppose I did.

Q. That is your best recollection?

A. Yes, sir.

Q. General, at that time were you attorney-general of Kansas?

A. Yes, sir.

Q. Since that time your term of service has expired, and you have resumed the private practice?

A. Yes, sir.

Q. You have been employed by the defendants since you resumed the private practice?

A. Yes, sir.

Q. When were you employed?

A. I was employed about the time Mr. Chamberlain and some others were brought here to Paris to jail.

Q. When was that?

A. I could not say when that was.

40 Q. Was it in February?

A. I do not know; it was before last February, though.

Q. Were they the first ones who were arrested?

A. They were the first ones that were brought here.

Q. Were you employed before or after you were summoned as a United States witness?

A. I was employed before I was summoned.

Q. Which place did you go when you went down there; the first place when you went down there to investigate the matter?

A. I went to Hugoton.

Q. Were the militia there when you went there?

A. They came afterwards. They had been sent first, before, on another matter.

Q. Do you know at whose instance the militia was summoned; do you know of your own knowledge?

A. I requested the governor——

Mr. HODGES. "Never mind about that; that has got nothing to do with this case. That does not rebut anything."

The COURT. "I do not see how that would be material?"

Mr. MCCOMB. "My only object was to show that he was taking part as a public officer."

The COURT. "He has already said he was sent there."

Mr. MCCOMB. "I am not particular about it, only to show that he was taking every precaution to make a careful investigation."

[To the witness:] I believe you say it was to Hugoton you went first?

A. Yes, sir.

Q. Did you go down to the stacks, the scene of the killing?

A. I did, sir.
Q. When did you go down there?
A. I went down there on Tuesday.
Q. Was that the Tuesday following the killing?
A. Yes, sir; as near as I can remember.
Q. Who went with you?
A. General Meyers, Capt. Wallace, and a Kansas City Times reporter, and the driver of our rig.
Q. How many stacks did you find there?
A. Three.
Q. How were they? Just describe them.
Mr. HODGES. "This is absolutely original testimony. It has never been disputed about these stacks at all; the original map has never
41 been disputed. There is no controversy about the stacks; none in the world. This is not in rebuttal. We object to it because it is not in rebuttal of anything."
Mr. MCCOMB. "It is just preliminary, so that the jury can understand his testimony, is all."
The COURT. "Of course, any preliminary question you may ask."

Mr. MCCOMB:

Q. How many stacks were there?
A. Three.
Q. Just state how they were situated with reference——
Mr. HODGES. "We except to allowing him to go over these questions."
The COURT. "Note the exception."
The WITNESS. There was two large and one small. The two largest stacks were longest north and south; and the small stack was immediately north of the west stack, the west large stack. The west stack was something larger than the east stack.
Q. Did you notice any lake or depression there?
A. Yes, sir.
Q. What direction were the stacks from that?
A. They were north of the west end of the lake.
Q. Were they near the lake, close by the lake?
A. Yes, sir.
Q. How did that stack north—what kind of a stack was that?
A. That was a small stack; seemed to be an incomplete stack.
Q. About how high?
A. Oh, perhaps five feet high.
Q. You speak of a draw or depression there. I will ask you if you went into that depression or draw, examined there?
A. I did.
Q. What did you find?
A. I found wagon-tracks, horse-tracks, and tracks of persons on foot.
Q. Now, where were these wagon-tracks? What kind of tracks were they—what sized tracks were they—large or small tracks?
A. I do not know that I could tell.
Mr. HODGES. "I will have to make another exception to this."
The COURT. "I admit that evidence, because the defense has introduced evidence as to where the tracks were.

42 Mr. HODGES. "I want to make this exception, and if the court has any doubt about it I would like to show the authorities. We except to this as original evidence."

Mr. MCCOMB:

Q. I did not understand you to say whether they were large or small tracks.

A. I could not tell at that date whether they were made by buggies or wagons.

Q. But they were vehicles, wagons—vehicle-tracks of some kind?

A. Yes, sir.

Q. What direction did you say they were from the stacks?

A. They were west from the stacks.

Q. Did you observe the Dudley trail there?

A. I did.

Q. How far were they from that trail?

A. Oh, they were not over 300 yards from it. I would say they were 300 or 400 yards from the trail.

Q. Now, general, about how far were they from the stacks?

A. About 150 or 100 feet.

Q. Did you measure?

A. No, sir; I measured the distance from the stack to the ravine. They were in the ravine.

Q. What do you call the ravine, general?

A. It is simply a depression running down from the higher ground into the lower, where water would run after a rain—something of that kind. It ran down from the higher land into the lake.

Q. Now, what direction did that drain run that ran down into the lake? What was its general direction?

A. It ran from a little northwest to southeast—pretty near north and south, I should judge, right at the lake.

Q. In the depression, general, was there any growth there of anything?

A. There was quite a rank growth of what they call grass—sort of rush.

Q. Rushes or reeds?

A. Yes, sir.

Q. I will ask you to state about how high was that growth—the rushes?

A. Oh, perhaps a foot or eighteen inches.

Q. I will ask you whether or not these rushes were tall enough to hide a man on his hands and knees?

A. Well, hardly; they would hardly hide a man on his hands and knees. A person's body might lie down and be practically covered by them, but on his hands and knees I do not know that they would.

Q. When you were there did you examine the trail to see where the party of buggies had left the trail?

A. Which trail do you mean?

Q. The Dudley trail.

A. There were a great many buggy-tracks that had apparently left the Dudley trail, or crossed the Dudley trail, pretty near north of the hay-stacks.

43 Q. Going in what direction?

A. They were going south; that is, the tracks were running north and south.

Q. Were the tracks running in the direction of the haystacks?

A. Yes, sir.

Q. I will ask you to state where else you found tracks of buggies about there?

A. There was one buggy or wagon track south of the haystacks.

Q. Did you examine on the east side of the haystacks?

A. Yes, sir.

Q. What did you find there?

A. I think we discovered tracks on the east side of the stacks; they were pretty near east.

Q. What kind of tracks were they?

A. They were wagon tracks more particularly, and horse tracks.

Q. I will ask you if you remember in your report whether you said wagon or buggy tracks?

Mr. HODGES. "I do not think what he said then has got anything to do with it."

The COURT. "I do not think it has, unless it is for the purpose of refreshing his memory. If that is the purpose, you may ask the question."

Mr. MCCOMB. "That is the purpose."

[To witness.] Q. I will ask you if whether in your report you did not state they were buggy tracks?

A. Possible I did, sir.

Q. Have you seen these tracks since?

A. No, sir; I have never been there since that time.

Q. What did you see just north of the stacks—immediately north of the stacks?

A. There were tracks of various; that is, horse tracks and so on; I didn't notice any buggy tracks immediately north of the stacks. The greatest commotion was a little north and west of the small stack.

Q. You saw more there?

A. Yes, sir.

Q. I will ask you to state if you gathered up any shells there?

A. Yes, sir; our party gathered up some; I got one, Capt. Wallace got one, and the Times reporter got one or two.

Q. Do you know how many shells you got there; that is, how many you saw there?

A. I think four shells were all we got—three or four, I think.

Q. What sized shells?

A. I think they were 44.

Q. Where were those shells, general?

A. Two of them were picked up north of where we found blood spots on the ground.

44 Q. About how far north?

A. Perhaps fifteen feet, as near as I can remember. One was found in the little haystack, possibly two feet from the ground, in the southwest part of the little hay stack. That, I think, was found by Captain Wallace.

Q. You did not find that?

A. No, sir; that is a fact.

Q. You are a lawyer, general. I do not want to be bothering you about hearsay testimony.

A. I beg your pardon; I did not intend to state that.

Q. While you were at Hugoton, I will ask you to state whether or not you interviewed the Cooks?

A. I did—C. E. Cook, in particular.

Q. I will ask you if C. E. Cook told you he was there with the party that did the shooting, but said that the shooting was done in self-defense; they were fired upon first.

A. No, sir.

Q. He did not?

A. No, sir.

Q. Now, general, to refresh your memory, I will ask you to look at this paper [handing witness a paper].

A. I remember the remarks there; I remember what I stated there.

Q. You stated that there?

A. Yes, sir.

Q. Now, general, in speaking of the Cook and the Hugoton party, to whom did you have reference?

Mr. HODGES. "That does not rebut anything. He must ask him the predicate he propounded to Col. Cook."

Mr. MCCOMB. "We can offer him in rebuttal of anything they introduced; that is, in rebuttal or impeachment either."

The COURT. "Yes."

Mr. MCCOMB. Q. When you referred to the Cook party, to whom did you refer?

Mr. HODGES. "We except. We do so on the grounds that his report has got nothing to do with this case; and upon the further ground that it is not done to refresh his memory at all."

Mr. MCCOMB (to witness):

Q. To whom did you refer?

A. In my report, in referring to the Hugoton party, I had fixed in my mind everybody who went from Hugoton out as the Cook-Hugoton party.

Q. You had?

A. Yes, sir.

Q. Did all the parties you inquired to find out there, did they go with Cook?

A. No, sir.

Q. They did not?

A. No, sir.

45 Q. I will ask you that if in your report you did not refer to several parties, and when speaking of the Cook party speak of it as the party headed by Cook; is that a fact or not?

A. That is not the way I considered it in making that report.

Q. To refresh your memory, I will ask you to look at that [handing witness a paper].

Mr. HODGES. "We except to that."

The COURT. "He is referring the witness to a certain part of it."

Mr. HODGES. "We make our exception that the witness is on the stand, and whatever is competent to be proved by him can be proved by him, and his report has nothing to do with it."

Mr. MCCOMB (to witness):

Q. Did you have a talk with Mr. Chamberlain?

A. I did.

Q. Whom, of the Cook party you speak of, did you converse with?

A. I conversed with C. E. Cook, Mr. Stehle, J. B. Chamberlain, Mr. O'Connor, that I remember of, the mayor of the town, Sam Robinson, and Johnny Hall, county attorney then, and a number of other persons—quite a number of persons at Hugoton.

Q. Did Mr. O'Connor state to you that he went down in the Strip with Cook?

A. He did not.

Q. Did Mr. Hall state that he went down into the Strip with Cook?

A. He did not.

Q. Did Mr. Chamberlain state he went down in the Strip with Cook?

A. I am not certain whether he did or not, sir.

Q. You are not certain?

A. No, sir.

Q. You were certain at that time, were you not, general?

A. Not that he told me.

Q. Did anybody state it in his presence?

A. No, sir.

Q. They did not?

A. No, sir.

Q. Did you have any talk with Mr. Lawrence?

A. I do not remember of seeing Mr. Lawrence. I can not remember now that I saw him; I might have done it, however.

Q. I believe you stated that you were acting under your oath of office when you made this report to the governor?

A. I was.

Q. I will ask you to state if the Cooks said they were fired upon from that little stack?

A. No, sir.

Q. They did not?

A. No, sir.

Q. Did Chamberlain state it?

A. No, sir.

Q. Did Lawrence state it?

A. No, sir.

46 Q. Did anybody state it?

Mr. HODGES. "We object to what anybody said."

The COURT. "I do not think it would be admissible unless in the presence of one of these defendants."

Mr. MCCOMB (to witness):

Q. Was it in the presence of either one of these defendants?

A. I do not remember that I heard it in the presence of these defendants.

Q. Did you ask them, the Cooks, or any of these defendants, or ask it in their presence, why it was that none of the Hugoton party were injured in the affray?

A. I did.

Q. Did they answer that it was because Cross and his men fired over the top of them?

A. I do not know that they answered in that language. All that I said in that report was my conclusions from what I had been told.

Q. I will ask you if they said that, because Cross and his party fired over the top of them from that stack?

A. No, sir; none of these defendants.

Q. Did Cook state they dismounted from their horses, and got out of their buggies and approached the stacks and fought in self-defense?

A. No, sir; he did not.

Q. I will ask you to look at that [handing witness paper].

A. That is the way I say there; but they did not tell me any such thing. I say that the language that is there in that line is what I said.

Q. I will ask you if C. E. Cook said to you that they intended to camp at the hay camp, and when they approached the hay camp they were fired upon by the Woodsdale parties; that they returned the fire and killed Sheriff Cross and the other three men and wounded the boy?

A. No, sir.

Q. Did Mr. O. J. Cook?

A. No, sir.

Q. Did Mr. Chamberlain?

A. No, sir.

Q. Did Mr. Lawrence?

A. No, sir.

Q. Did Mr. Calvert?

A. No, sir.

Q. Did any of these defendants?

A. No, sir.

Q. I will just ask you to look at this to refresh your memory [handing witness paper]. Did they state that in substance?

A. No, sir.

Q. Did you have a conversation with Dave Scott, the witness, who testified here?

A. I did.

Q. Where did you have that conversation?

A. At his house, I think it was.

Q. In whose presence?

47 A. A. P. Haws—I believe it was the old gentleman Haws; and Gen. Meyers and Capt. Wallace were present part of the time.

Q. I will ask you if he did not state in that conversation that he was a partisan, a friend of the Hugoton faction?

A. I think he did, sir.

Q. I will ask you if he did not state in that conversation that he undertook to get out of the tent and that somebody told him to stay back?

A. Either him or Mr. Haws made that statement; I am not certain which.

Q. Do you not remember which?

A. I am not positive; no.

Q. Look at that to refresh your memory [handing witness a paper]. I will ask you to just try and refresh your memory and see if he did not make that statement to you?

A. He said something about it, but I could not say exactly just what words he used.

Q. Well, at that time you did know the words he used, did you not?

A. Yes, sir; but whether I wrote them down or not, I do not know.

Q. Did he not say that in substance?

A. I can not say whether he did, or not. Either he or Mr. Haws did say that in substance, but which one I can not say.

Q. I am not asking what Mr. Haws said. I just want you to refresh your memory and think whether Dave Scott said that, or that he did not?

A. He said something about that matter.

Q. He undertook to go out of that tent and some one told him to step back?

A. Yes, sir; something about going out and some one told him to stay back or he would get hurt; something like that.

Q. He said that, you think, in substance?

A. Yes, sir.

Q. I will ask you to state if he did not state to you there that he recognized the parties, including Chamberlain, the Cooks, and Sam Robinson, at the killing?

A. He recognized them as being there at the stacks at that night—yes, sir.

Q. Did Scott tell you that he had made a statement in writing, and that he had given it to the Hugoton people?

A. I think he did, sir.

Q. You are certain about that, are you, general, that he made that statement?

A. I am quite certain of it.

Q. I will ask you if Mr. Scott in his statement said, speaking of Cross, when they came up there they pulled their saddles off their horses and staked them out where they could reach the windrows of hay that they had raked up.

A. I think to my question he made the affirmative answer—
48 yes, sir; I think that language is the question I asked him, and he said yes.

Q. I will ask you if he did not state that the shooting was all done before he got out of the tent, and he did not know who shot first?

A. I can not say whether he did or not.

Q. Do you remember whether he stated that or not?

A. No, sir.

Q. I will ask you if he did not state, when he looked out he saw both the Cooks and Robinson and Chamberlain and John Jackson, and that he did not know what the racket meant?

A. No, sir; I do not think that he made any such statement.

Q. I will just show you this affidavit [hands witness a paper]; I will ask you if Scott did not tell you in that conversation that while that shooting was going on—I will ask you if he did not say this: "While the shooting was going on we were warned not to go out of the tent?"

A. He said something about not going out of the tent; I can not say what words he used.

Q. Did he not say that in substance?

A. It might be the substance of it.

Q. How many shells did you say you saw there yourself?

A. I saw four, and then when I got to Voorhies I saw other shells, but of course I don't know only as I was told——

Q. You need not state anything about the shells at Voorhies, unless you know they were from there. You are an attorney.

A. I say that I do not know where they came from.

Q. You have seen shells in Topeka, Kansas, have you not?

A. Yes, sir.

Q. Did you examine a spot of blood out in the lake?

A. Yes, sir.

Q. How far was that from the stacks?

Mr. HODGES. "I certainly think that is hardly in rebuttal to anything."

The COURT. "I do not see how that is in rebuttal to anything."

Mr. MCCOMB (to witness):

Q. Did you find any shells out there yourself?

A. No, sir; I did not.

Q. I believe you state that these shells you saw there were 44?

A. Yes, sir.

Q. You looked at the number, did you?

A. Yes, sir.

49 Q. Did the Cooks, or either one of them, tell you who were in their party that went down there—that is, who went with the Cocks?

A. Who went in his party?

Q. Yes, sir.

A. I do not think he named all of the parties.

Q. Did he tell you the number of men who were in it when they left Hugoton?

A. I do not think he did.

Q. Who did Cook say was with him?

A. He said that he and his brother rode in his phaeton, and that there were three rigs; that is about the way he put it—three rigs in their crowd.

Q. Did he not state the number of men?

I do not think he did. I do not now remember that he did. [Witness is shown a paper, which he reads.] I did not get that information from him, though.

Cross-examination by COUNSEL FOR DEFENDANT:

Q. What time did you get to Hugoton on your trip?

A. I got to Hugoton about 9 o'clock Sunday night.

Q. What time of day did you see Chamberlain the next day?

A. Well, sir, it was soon after breakfast; I can not say what time; perhaps between 7 and 8 o'clock.

Q. Do you know how he came down town?

A. No, sir; I do not.

Q. Did you see him leave town?

A. No, sir; I did not.

Q. He came down and had an interview with you; you know that?

A. Yes, sir.

Q. You were asked this question: If Col. Cook told you who that party was, and he asked you the conclusion you came to. I will ask you if you did not come to the conclusion, from what you learned, that the party at the hay stacks were Bell Izor, J. W. Calvert, Charles Calvert, Smith Grubb, A. M. Donald, John Rutter, Fred Brewer, Sol Kott, O. J. Cook, C. E. Cook, J. B. Chamberlain, and Clarke?

Mr. McCOMB. "Do not tell your conclusions."

Mr. HODGES. "If the court please, the gentleman brought this out, that in General Bradford's statement he has been refreshing his memory with, that he said his conclusions he came to from the facts that he had gathered that these were the men."

The COURT. "I do not think that is admissible. I think that Col. Bradford did state a conclusion, but I do not think it was asked him."

50 Col. HODGES (to witness):

Q. What time did you leave Hugoton to go to Woodsdale?

A. I left there after dinner on Monday.

Q. Now, did you take any written notes of what anybody said to you at Hugoton?

A. No, sir.

Q. You simply undertook to keep that in your mind, without taking any notes. Did you take any sworn statement from Dave Scott?

A. No, sir.

Q. You say you took it down in pencil, carried it home, and turned it over to some other fellow, and he wrote off some document from that; you do not remember of ever comparing to see whether it was correct or not?

A. No, sir.

Q. Your report you made was a conclusion you came to?

[No response.]

The counsel for the defense objected to the evidence of the witness on the ground that such evidence was not in rebuttal, but was original evidence and should have been introduced by the Government in chief; which objection was overruled by the court, and the defendants then and there excepted.

The defendants' counsel also objected to the Government asking the witness what he stated in his report about the wagon or buggy tracks; whether witness stated in his report that he said the wagon or buggy tracks east of and near the hay stacks where the killing occurred; on the ground that the statement of the witness in his report as attorney-general was irrelevant and hearsay, and not evidence against these defendants; which objection was overruled by the court, and the witness permitted to state that in his report he stated there were buggy tracks; to which rulings of the court the defendants then and there excepted.

The defendants also objected to the Government being allowed to ask the witness if he did not state in the report which he made as attorney-

general of Kansas, that C. E. Cook told him that he was there
51 with the party that did the shooting; that the shooting was done in self-defense; that they were fired upon first, on the grounds that the witness was the Government's witness. That when the witness was asked by the Government if C. E. Cook did not make such a statement to him, he answered that he did not; that the Government could not in this way discredit its own witness; that what was stated by the attorney-general of Kansas was irrelevant and hearsay; was not admissible against and could not affect these defendants. Which objection was overruled by the court, and the witness was permitted to say to the jury that the witness did make such a statement in his report; to which ruling of the court the defendants then and there excepted.

And the defendants objected to any and all evidence of the witness as to what he had stated with reference to this transaction in his report as attorney-general of Kansas, on the grounds that the testimony was irrelevant, immaterial, and hearsay; which objections were overruled by the court, and the statements admitted, and defendants excepted; after all of which testimony was admitted over the objections of the defendants the Government offered and read in evidence the following parts of the report of the said witness, as attorney-general of Kansas, to wit:

Mr. McComb. I shall now read those portions of the report to the jury:

"I interviewed the two Cooks, Sam Robinson, and various other persons. The Cooks are very determined. They insist that the Woodale fellows are at fault. They admit that they were with the party that did
52 the shooting. They say the shooting was done in self-defense; that they were fired upon. This statement is agreed to by all parties who were with the Hugoton party, who did the shooting."

No. 2: "The Hugoton party all agree in one statement, as I have before stated, that they themselves were intending to camp at the hay camps, and that when they approached the hay camp for the purpose of going into the camp they were fired upon by the Woodsdale parties—the sheriff's posse—and that they returned the fire and killed Sheriff Cross and the three other men and wounded the boy."

"I first took Scott's statement. He agreed substantially with the Hugoton people. He said he had been at Hugoton, and made a statement in writing and gave it to the Hugoton people. He said in substance that this party came there, as stated by the boy, after 9 o'clock. He said that he was a partisan and a friend of the Hugoton faction. * * * That he undertook to go out of the tent, and that some one told him to stay back. He says that he recognized nearly all of the persons whose names I have heretofore given, including Chamberlain and Cooks and Sam Robinson, and he thinks there were some persons there who were not named in the list I have heretofore given."

"In this draw we observed horse-tracks, tracks of men on foot, and buggy-tracks, indicating that one part of this Hugoton party had followed this trail in their approach to the camp. Near one of the hay-stacks we observed buggy tracks, which had come from the trail, where the whole party seem to have left the trail. On the east side of the stacks and the south side of the stacks were buggy tracks."

"Cook's party of the Hugoton faction say they were fired on from this little stack, and when I asked them why it was that none of the Hugoton party were injured in this affray, they insist that it must have been because Cross and his men fired over the top of them. Cook agrees that they dismounted from their horses and got out of their buggies as they approached the stacks, and maintains that they fought in self-defense."

The defendants objected to the introduction of such parts of said report, on the grounds that it was irrelevant, was hearsay, was the statements and conclusions of a third party who had no knowledge of the facts; that under the laws of Kansas it was not the duty of the attorney-gen-
53 eral to make such report, and that the said witness, Bradford, as attorney-general of Kansas, had no power or authority to act, in his official capacity, upon the matter about which he had made such report; which objections were overruled by the court, and the parts of the said report, as before stated, were read to the jury. To which ruling the defendants then and there excepted.

[The parts of Attorney-General Bradford's report admitted in evidence were neither offered nor admitted as a public document, but to show that witness had made different statements at another time and place.]

And be it further remembered, that on the trial of this cause the defendants offered S. W. Dunn as a witness, who, being sworn, testified he was sheriff of Seward County, Kansas. They then offered to prove by the witness that only a few days before the killing of John M. Cross he, the witness, went to Woodsdale, Kansas, to arrest Bob Hubbard, who was killed at the same time that Cross was killed. That witness made his business known to Cross, and informed Cross that he, the witness, had a warrant for Hubbard, charging him with the offense of assault with intent to kill. Cross first said, "I am now looking for Hubbard, and you can get him;" but later in the day Cross told witness that he, Cross, did not want him to arrest Hubbard, that he, Cross, had had a good deal of trouble in Stevens County; that certain parties had given him dirt. He named the Cooks, Chamberlain, Calvert (defendants here), and Sam Robinson as the parties had given him dirt, and said he wanted to use Hubbard against the Hugoton fellows; that he thought Hubbard was the kind of a man he wanted, and therefore he would rather witness
54 would not arrest him. Witness failed to get Hubbard. That the witness informed the defendants of this before the killing of Cross.

The defendants also offered one T. H. Furguson, by whom they offered to prove that the witness and John M. Cross (the deceased) used and occupied the same office together, and a short time before Cross was killed Cross, in the office one day, speaking about the troubles they had had, said he "would kill Sam Robinson the first opportunity he got, and if the Cooks and Chamberlain did not look out, they would get what they did not want."

The counsel for the Government, as each witness was introduced, objected, because the evidence does not show threats against either of these defendants on trial. The defendants insisted that the evidence of the said witnesses is admissible as a fact going to show the intent and purpose for which the deceased, Cross, went into the Strip, and serves to show who probably was the attacking party. Also, because the Government had

proven that Ed. Short was at Gough Creek, in No Man's Land, and there holding some of these defendants by force, and while so holding said defendants Short sent a messenger to Woodsdale after Cross and others, who immediately armed themselves and went to the place where Short had held up these defendants, and because Sam Robinson is jointly indicted with these defendants, and charged therein with acting together with them, and the Government had proved that he was the principal actor in the killing, and the Government counsel claim that these defendants and Sam Robinson acted together in the recounter in which the killing took place, and
55 because the theory of the defense is that the deceased, Cross, Ed. Short, and others, including the others killed at the time Cross was killed, had formed a conspiracy to kill the defendants, and were in search of them when the killing occurred.

The court sustained the objections of the counsel for the Government to the evidence of the witnesses S. W. Dunn and T. H. Furguson, and refused to permit said witnesses to testify in behalf of these defendants on trial; to which said ruling of the court in sustaining the said several objections of the counsel for the Government, to the said evidence of the said witnesses separately made, and sustained these defendants, here now in open court and then and there excepted, and tend us this their bill of exceptions.

Be it remembered, that on the trial of this cause, the following proceedings were had:

The defendants on trial offered to prove, and proved by W. S. Steel, that he, the witness, resided in Hugoton, Kansas, in July, 1888; that witness had a conversation with the deceased, John M. Cross, only a few days before he was killed; that in said conversation Cross made threats against the life of Sam Robinson, one of the parties indicted in this cause, but not on trial.

The counsel for the Government objected to this on the ground that Sam Robinson, though indicted, was not on trial, and that threats against him were not admissible. The jury were then sent out of the court room, and the witness testified to the court that he heard Cross say a few days before he was killed that he, Cross, and defendant Sam Robinson, could not live in the same country; that he had no warrant for Robin-
56 son, and he did not want to arrest him, "But God damn him, he would kill him." Witness testified to the court that he informed Sam Robinson of these threats the same day, but could not say that Cross made any threats against either of the defendants on trial.

The jury was then brought back into the room, and the counsel for the defendants insisted that the witness be allowed to testify before the jury to the facts above stated, and testified to by him before the court. Counsel for the Government objected, and the court sustained the objection and excluded from the jury what the witness had said, and refused to allow the said witness to testify before the jury, and gave the following reason: "Sam Robinson is indicted with these parties. If Sam Robinson was on trial this evidence would be admissible, but even if threats had been made against Sam Robinson, I don't see how it would avail these defendants. The fact that a threat was made against some defendant who is not on trial, and no evidence to show that these parties were interested in the threats—they could not take up Sam Robinson's quarrel and introduce a threat made against him, Sam Robinson."

The defendants' counsel insisted that the evidence was admissible, because Sam Robinson is indicted jointly with these defendants; and the Government claims, and has introduced proof, that Sam Robinson was a principal actor in the killing. Hence defendants say that whatever would be a defense for Sam Robinson is admissible in the defense of these defendants. The court adhered to its ruling, and excluded the
57 evidence and testimony of the said witness, and refused to allow him to testify to said facts before the jury. To which ruling and judgment of the court the defendants here now on trial then and there excepted in open court, and tender this their bill of exceptions and pray that the same may be signed and approved by the court and made a part of the record of this cause, which is accordingly so ordered and done. Witness my hand this — day of June, A. D. 1890.

And be it also further remembered, that on the trial of this cause, the court among other things instructed the jury that when several persons are jointly indicted and prosecuted, "if the facts justify it, the law permits the jury to convict some of murder, some of manslaughter, and some not guilty; and if you fail to agree as to any, you may return a verdict as to those convicted and those you find not guilty, and those you fail to agree upon, naming those of the defendants you find guilty, those not guilty, and those you fail to agree on." On the 7th day of July, 1890, the jury came into open court, and through their foreman said they had agreed upon a verdict, "as near as we can, we think, under the instructions of the court," and passed the finding to the court, who read it, but not aloud, and did not publish it; and the counsel for the Government said the verdict could not be received without the consent of the defendants. The contents of said verdict was not made known to the defendants, and the court handed it back to the jury. As he did so the counsel for the defendants objected, stating that the verdict had been received and examined by the court, and if it responded to the court's charge it should be read.

The court then asked the counsel for the defendants if the defendants were willing to receive the verdict, and the counsel answered, "If the court will receive the verdict back from the jury I will answer the ques-
58 tion, or if the court will inform me to whom of the defendants the question is addressed, I will answer you." The court replied, "The question is addressed to all of them." The verdict was not made known to the defendants, but it was as follows:

"We, the jury, find C. E. Cook and J. B. Chamberlain guilty as charged in the indictment. We find William O'Connor, Smith Grubb, J. W. Calvert, A. M. Donald, and John A. Rutter not guilty. We fail to agree as to O. J. Cook, Cyrus Frease, John J. Jackson, and J. Lawrence."—J. L. Ballinger, foreman. And a mistrial as to Ed. Bowden."

The court sent the jury back to the jury room over the objections of the defendants.

The defendants, by their counsel, then and there claimed that the court had received the verdict and read it, and it responded to the court's charge; hence it was the verdict of the jury, and should be received by the clerk and recorded.

On the next day the jury came into open court and announced that they had agreed upon a verdict, and handed their finding to the judge presiding; and when he offered to pass the verdict to the clerk of the court, the

defendants, by their counsel, objected to the verdict being received, published, and recorded, because the jury had, on a former day of the term, returned into open court another and different verdict, which said first verdict responded to the charge of the court, and should have been received, published, and recorded.

2d. Because the delivery back to the jury by the court of the first verdict and finding, and sending them out to the jury room, was in law a discharge of said jury, and they now had no right to return a verdict finding the defendants O. J. Cook, J. Lawrence, John J. Jackson, and Cyrus
59 Frease guilty; and the verdict as to the other defendants could not be received after the jury had been discharged.

All of which objections of defendants were by the court overruled, and the last verdict received over the objections of these defendants; to which rulings, actions, and doings of the court in and about the said verdict the said defendants then and there in open court excepted.

[The above bill of exceptions is allowed, with this explanation: The paper referred to in the bill of exceptions, and called a verdict, which was handed to the court by the foreman of the jury, was not published by the court, nor its contents announced or ever stated by the court or by authority of the court, nor were the jury asked if they agreed to this as a verdict, when said paper was handed back to the foreman and the jury instructed to return and consider further of a verdict.]

Be it remembered, that at the commencement of the trial in the above cause of the defendants, C. E. Cook, O. J. Cook, J. W. Cabert, J. B. Chamberlain, A. M. Donald, Ed. Bowden, John J. Jackson, Cyrus Fresse, Wm. O'Connor, John Launna, W. S. Grubb, and John A. Rutter, the witnesses on behalf of the Government and the said defendants, were called into court, and after being sworn and placed under the rule, were then permitted by the court, by consent of counsel, to go out of the court room and remain out of the hearing of the trial, and instructed by the court to converse with no one except counsel about the case, and not to read the papers. When the witnesses were so called, some of them failed to answer to their names. Counsel for the Government and the said defendants in open court then agreed to have the absent witnesses sworn, instructed, and put under the rule, when they came to the court room, which was so ordered by the court, and the court ordered the marshal not to allow any of the
60 witnesses to come into the court room during the time the evidence was being detailed, except as called.

When the said defendants were offering and introducing their evidence in chief they offered one Orin Shirley as a witness, who was summoned as such for the defense; but from some cause was not placed under the rule, which fact was not known to the defendants or their counsel until said witness was called to testify. The witness stated on the stand as follows:

COUNSEL FOR DEFENDANTS:

Q. Where do you live?
A. Hugoton, Stevens County, Kansas.
Q. How long have you been living there?
A. About four years.
Q. Did you know John Cross?
A. Yes, sir.

Q. How long did you know you?
A. Four years—about four years.
Q. Do you remember about the time of the bond election in Hugoton, in that county?
A. Yes, sir.
Q. Did you see him along about that time?
A. I saw him that day.
Q. Do you remember of having a conversation with him, at any time within a few months before this killing took place, in which he mentioned any of these defendants?
COUNSEL FOR GOVERNMENT. "Ask him when he had the conversation."
COUNSEL FOR THE DEFENSE. "I do not know myself. I am trying to get at the particular conversation."
(To the witness.) Q. Did you have a conversation with him at any time?
A. I had a conversation with John Cross the day of the election.
Q. Did you have any conversation at any other time?
A. Yes, sir; frequently, he passed my place often.
Q. Did you, in any conversation you had with him, have any talk about these defendants, these men on trial?
A. Yes, sir.
Q. When was that and where was it?
A. The day of the railroad election.
Q. Where was you at?
A. I was between Mrs. Miles's hotel and Stehle's drug store, right there by a building known as the Cowan building—kind of a confectionery store.
Q. Did you have any other conversation except that—that took place at that particular point?
A. I don't believe I talked to him only.
Q. Where was the conversation? Name the place that you
61 talked to him that day.
A. Right there in front of the confectionery building.
Q. That is the time you had the conversation?
A. Yes, sir; I met him there.
Q. There is where you met him?
A. Yes, sir; he was going north and I was going south, and I met him on the street there.
Q. I will ask you if in that conversation he made any threats against these defendants?
A. Well, sir, I met him there——
Q. Answer the question—did he make any threats?
A. Yes, sir.
Q. State what was it he said.
A. He said if Sam Robinson didn't let him alone he would fill his hide so full of shot it wouldn't make a sieve, and Chamberlain had better look out, or he would get him, too. That was the day of the bond election.
Q. How was the feeling there?
A. They were all opposed to the election, that town was.
Q. How was Cross?

A. He was in favor of it.
Q. Were you and John Cross friendly?
A. Yes, sir.
Q. Had you always been friendly, or not?
A. Yes, sir.
Q. Now do not answer this. I want to ask you the question, how did this conversation come up between you and Cross?
COUNSEL FOR GOVERNMENT. "I think your honor has ruled on that."
The COURT. "I do not care how it came up."
COUNSEL FOR DEFENDANTS (to witness). Q. "State to the jury all that was said in the conversation between you and Cross."
The COURT. "You needn't answer that."
COUNSEL FOR DEFENDANTS. "We are asking him the question in order that it may go on the record."

Cross-examined.

COUNSEL FOR THE GOVERNMENT:

Q. How long have you lived in Hugoton?
A. Off and on for four years. I lived on the claim a part of the time, and part of the time in town.
Q. What is your business?
A. I do anything to make any money out of it; moving houses, farming, freighting.
Q. You are still living in Hugoton?
A. I am now; yes, sir.
Q. How long have you been down here?
A. Be eight weeks to-morrow, I believe.
62 Q. Been here eight weeks?
A. Yes, sir.
Q. You are in the witness business now, are you?
A. Yes, sir.
Q. Who was present when you had that conversation with Cross?
A. A brother of mine.
Q. Is he here?
A. Yes, sir.
Q. He is in the witness business, too?
A. Yes, sir.
Q. What is his name?
A. Shirley.
Q. His given name?
A. Ora Shirley.
Q. Just you and your brother and Cross?
A. Yes, sir.
Q. Whereabouts in town did you live then?
A. I lived in the north end of time.
Q. Did you ever hear Mr. Calvert talk about this case?
A. No, sir; I never did.
Q. Did you ever hear Mr. Cook talk about it?
A. I never did; I never heard him particularly speak about it.
Q. Either of the Cooks?

A. No, sir; not particularly.
Q. Did you ever hear Mr. Jackson talk about this case?
A. No, sir.
Q. Did you ever hear Mr. Lawrence talk about it?
A. No, sir.
Q. Did you ever hear Mr. Calvert talk about it?
A. No, sir.
Q. Did you ever hear Mr. O'Connor talk about it?
A. No, sir.
Q. Did you ever hear Mr. Donald talk about it?
A. No, sir.
Q. Did you ever hear Mr. Grubbs talk about it? Do you know all of these defendants here?
A. Yes, sir.
Q. Have you talked with them since you have been here?
A. Yes, sir.
Q. Talked with them about this case?
A. No, sir, not particularly.
Q. Just talked generally?
A. Just in a friendly way is all.
Q. Have you been sworn and put under the rule?
A. No, sir; I have never been sworn.
Q. What you have told in here has not been under oath?
A. No, sir.
Q. You were never instructed not to talk about the case, or any of the evidence?
A. No, sir.
Q. You have not been reading any of the papers?
A. No, sir.
Q. You never read the papers, do you?
A. Hardly ever; sometimes I do.

COUNSEL FOR THE GOVERNMENT (to the court): "I have no further questions."

63 COUNSEL FOR THE DEFENDANTS: "I will ask to have the witness sworn."

The COURT: "I will exclude all of this evidence. The jury will not regard it. He has neither been instructed, sworn, nor anything else. [To the witness:] Stand aside."

COUNSEL FOR DEFENDANTS: "We ask to have the witness sworn."

The COURT: "The witness will stand aside."

COUNSEL FOR THE DEFENDANTS: "We except to the ruling of the court."

The COURT: "Yes, sir. [To the jury:] You will not regard anything that that man said."

Counsel insisted that the witness be allowed to be sworn and allowed to testify, because they then and there stated to the court that they did not know that the witness had not been sworn until he so stated on cross-examination; that the defendants and their counsel are in no way to blame. The court had told the marshal at the door of the court room not to allow any witnesses in this case to come into this court room during the trial. This was done after the court knew that the witnesses were not all under

the, that had been called, and it was agreed to put them under the rule when they reported. Defendants ought not to be deprived of witness's evidence on the ground that he had not been sworn and put under the rule. The court refused to allow the witness sworn, to which said ruling of the court the defendants then and there excepted and tender this bill.

And be it further remembered, that on the trial of this cause the Government introduced as a witness one Noah Legg, who testified as follows:

"I was present at Reed's camp, on Gough's Creek, in No Man's Land, on the 24th day of July, 1888, when Ed. Short and three other
64 men surrounded Sam Robinson, C. E. Cook, O. J. Cook, and A. M. Donald, who were camped there with their families, on a fishing excursion. Ed. Short demanded the surrender of Robinson, which was refused. Robinson mounted his horse and got away. Short and his party chased him, but they did not shoot at him. John M. Cross and party got to Reed's camp on Gough Creek about daylight on the morning of the 25th day of July, 1888. I left the camp about 2 o'clock on the said 25th day of July, to go to Moscow, Kansas; rode all night, and got to Moscow some time before daylight the next morning. I left Cross and party at Gough Creek."

On cross-examination, the defendants' counsel asked witness what he went to Moscow, Kansas, for, and why he rode all night, to which the counsel for the Government objected as being irrelevant; which objection was sustained by the court, and the defendants excepted.

The defendants expected to prove by said Legg that Cross had sent said Legg to Moscow to get fifteen armed men to meet said Cross in No Man's Land the next day. This evidence was excluded on the objection of the Government that said evidence was irrelevant; to which the said defendants then and there excepted.

And be it further remembered, that after the evidence for the Government and for the defendants had been introduced, and the argument of the counsel for the Government and the defendants was concluded, the court charged and instructed the jury as follows:

GENTLEMEN OF THE JURY: The following persons, to wit, Samuel Robinson, J. B. Chamberlain, A. M. Donald, C. E. Cook, O. J. Cook, J. W. Calvert, James Rigley, George B. Teames, Cyrus Frease, William
65 O'Connor, John J. Jackson, J. Lawrence, George T. Smith, D. Bowden, Frank Balsley, J. B. Izor, Sylvester Maher, jr., George Moorehead, F. G. Brewer, W. S. Grubb, John A. Rutter, B. E. Stehle, Harry Lee, Charles Calvert, A. Noble, John Childress, L. J. Pettijohn, J. E. Freasor, Grany Humphreys, and P. H. Furguson, are charged by indictment filed in this court on October 31st, 1889, with the murder of John M. Cross, on the 25th day of July, 1888, in what is known as "the Neutral Strip," or "No Man's Land;" and in said indictment it was also charged that said persons above named killed said Cross by means of guns and pistols, fired and discharged in and upon said Cross; and it is further charged that said No Man's Land, or Neutral Strip, is within the jurisdiction of this court.

Of the persons above named, the following only are upon trial, to wit: C. E. Cook, O. J. Cook, J. B. Chamberlain, Cyrus Frease, John J. Jackson, J. Lawrence, A. M. Donald, William O'Connor, John A. Rutter, W.

S. Grubb, J. W. Calvert, and Ed. Bowden. These defendants have been arraigned and have plead not guilty and by virtue of said plea, the Government is put upon proof of the allegations of the said indictment, as hereinafter stated.

Owing to the sickness of the defendant, Ed. Bowden, he has agreed to a mistrial as to himself, and no matter what your verdict may be as to the defendants herein, as to said Bowden you cannot agree.

If you believe from the evidence that John M. Cross was murdered in No Man's Land, or the Neutral Strip, as herinafter defined, prior to October 31, 1889, you are instructed that said No Man's Land, or
66 Neutral Strip, is within the jurisdiction of this court; and if the parties so killing said Cross have committed any offense, they can be tried and punished in this court.

The indictment, as stated, charges that John M. Cross was murdered by the parties above named by means of guns and pistols. The statutes of the United States do not define murder, and it therefore becomes my duty to define it. Murder is defined as follows: "When a person of sound memory and discretion willfully kills any reasonable creature in being, in the peace of the country, with malice aforethought, either expressed or implied, is guilty of murder." You will note that the killing must be willfully done, and that it must be done with malice aforethought, either expressed or implied.

If the killing is done in self-defense, or under such circumstances as to reduce it to manslaughter, as hereinafter defined, it would not be murder.

The term "willful," as above used, means that the killing is done under such circumstances that the law neither excuses nor justifies the act; it must be an act intentionally and not accidentally done.

By the term malice, as above used, means the willful and intentional doing of a wrongful act without legal justification or excuse.

Express malice legally means that the act is done upon due consideration but is actuated by an evil disposition. If a person with a sedate and deliberate mind and formed design unlawfully kills another, the killing is characterized as being done with express malice. In determining whether the killing is done upon express malice, former grudges, and quar-
67 rels, antecedent threats, the manner in which the killing is done, are to be considered in order to discover the real condition of mind of the party doing the killing at the time the act is done. The law says that "if a person, with a sedate and deliberate mind and formed design, unlawfully kills another, the killing is done with express malice;" but this sedate and deliberate condition of the mind cannot be definitely defined as to time. It may exist for years, or it may exist only a few moments before the killing is done. But if it is found from the facts and circumstances surrounding the homicide to have existed at the time the act is done, the law characterizes it as a killing upon express malice.

Implied malice is that malice which the law attaches to every intentional killing. For instance, where one person kills another, and there is no evidence which establishes express malice, and there are no facts shown which excuse, justify, or mitigate the offense, the killing is said to be done upon implied malice.

The defendants on trial are charged as principals in legal effect, with the killing of John M. Cross. It therefore becomes necessary to define to you

who are principals in the commission of an offense. All persons are principals in the commissions of a crime if they are present at the time it is committed, and, knowing the unlawful intent of the party who actually commits the crime, consent, procure, advice, or assist in the commission of the same. A crime may consist of many acts, which must all be committed to complete the offense; but every person present, consenting to the commission of the offense, and doing any act which is an ingredient of
68 the crime, or immediately connected with or leading to its commission, is as much a principal as if he had, with his own hand, committed the whole offense. Mere suspicion, presence, or bare knowledge that an illegal act is being done by others, without any participation in or connecting with it, is insufficient to render a person criminally liable for the offense committed. But such facts may be taken into consideration by the jury, in connection with other circumstances, to aid in determining whether the party charged was a participant in the guilty act shown.

By the term "present," as above used, is not meant that each of the defendants must have been actually and physically at the place and at the time John M. Cross was killed; but if they were near the place when and where the crime was committed, and knew of the criminal intent of the person or persons who actually did the killing, and were there "for the purpose of" aiding in the commission of said crime by acts if occasion demanded, or for the purpose of encouraging by their presence the person or persons so committing said crime, though so acting, would be legally present at the commission of said offense, and would be principals in its commission. Or, if any of the defendants were at such a distance that they could not aid in the actual commission of the offense, but at the time the offense was committed they were then doing some act in furtherance of the criminal design to take the life of John M. Cross, then such persons would also be principals.

Manslaughter is the unlawful killing of a human being without malice, express or implied. It may be voluntary or involuntary. It is voluntary when committed with the design to kill under the influ-
69 ence of a sudden and violent passion caused by great provocation, which the law, in its tenderness to the infirmity of human nature, considers such a palliative of the offense as to rebut the presumption which would otherwise arise of malice. It is involuntary when committed by accident or without intention to take life.

The difference between murder and manslaughter consists in the existence of malice, express or implied, in the one case, and the absence of malice in the other.

Homicide is justifiable when committed to prevent murder or the infliction of serious bodily harm, provided it reasonably appears from the acts or acts and words of the person killed that it was the purpose of such party to commit murder or inflict serious bodily harm, and such killing takes place while the person killed was in the act of committing murder or serious bodily harm, or was doing some act at the time he was killed, showing an intent upon his part to kill or do serious bodily harm to the person so killing him.

When a person is accused of murder, and seeks to justify on the ground of threats against his life, the threats are admitted as evidence; but the same do not afford any justification for the offense unless it be shown that

at the time of the homicide the person killed, by some act then committed, manifested an intention to execute the threat so made, or did some act from which such inference could be drawn, as viewed from the standpoint of the party charged with the murder.

If you believe from the evidence that the defendants, C. E. Cook
70 J. B. Chamberlain, John J. Jackson, Cyrus Frease, J. Lawrence O. J. Cook, A. M. Donald, William O'Connor, John A. Rutter W. S. Grubb, and J. W. Calvert did, as charged in the indictment, on the 25th day of July, 1888, in No Man's Land, or the Neutral Strip, unlawfully kill the deceased, John M. Cross, with guns or pistols, or both, and that said killing was done with malice aforethought, either express or implied, as above defined to you, and was not done un' circumstances which would reduce the killing to manslaughter or justifiable homicide, then you are instructed that such killing would be murder, and you would so find by your verdict.

If you should believe from the evidence that John M. Cross was killed at the time and place and in the manner and by the means charged, but should believe that he was killed by some person other than the defendants, and also believe from the evidence that the defendants were present, as heretofore defined, and knew of the unlawful intent of the person doing said killing, and encouraged the person doing such killing by words or acts, and that such killing was done upon malice, either express or implied, and was not done under circumstances which would reduce the killing to manslaughter or justifiable homicide, as above defined, then you are instructed that the defendants so found to be present would be guilty of murder.

If you believe from the evidence that John M. Cross was killed at the time and place and in the manner and by the means charged, and should also believe that the defendants, or either of them, was present at said killing, but that the defendants did not aid or encourage such killing,
71 or did not know of the unlawful intent of the party actually doing the killing, in that event you are instructed that the defendants would not be guilty, and you will so find.

If you believe from the evidence that John M. Cross was killed at the time and place and in the manner and by the means charged in the indictment, and that the defendants were approaching the haystacks at the time said Cross was killed, but do not believe that the defendants did said killing in person, and do not believe that said defendants were acting in connection with the parties that did the killing, as above defined, in that event you are instructed that defendants would not be guilty; and you will so find.

The defendants can not be held liable for the murder of John M. Cross, unless you believe, from the evidence, that said Cross was killed at the time, place, and manner and by the means charged in the bill of indictment, and that the defendants were either present, assisting in the actual killing, or present, aiding, or encouraging the party doing the killing, or were near at hand and were acting in connection with the party doing the killing.

If you believe, from the evidence, that other persons than the defendants actually did the killing of John M. Cross, in that event the defendants could not be held liable unless they knew of the criminal intent of the

party doing the killing, and were present for the purpose of aiding by acts, or encouraging by their presence, the person actually doing the killing.

72 If you believe, from the evidence, that the defendants killed John M. Cross, as charged, or that the defendants were present when he was killed by some other person, but that they knew of the unlawful intent of the party so doing said killing, and encouraged by words or acts, or by their presence, the party in the commission of said offense, but also believe that the defendants were acting under the influence of sudden passion, caused by great provocation, and that said killing was not done on malice, expressed or implied, in that event you will find defendants not guilty of murder, but guilty of manslaughter.

If you believe from the evidence that as defendants approached the haystacks, John M. Cross, or any of his party, or any person at said haystacks, fired upon the defendants, or did any act showing an intention to take the life of any of the defendants, or to inflict upon any of the defendants serious bodily harm, and that defendants returned said fire, or fired to prevent such threatened danger, and that said Cross was thus killed, you are instructed that such killing would be justifiable homicide, and find defendants not guilty.

If you believe from the evidence that John M. Cross had threatened to take the life of any of the defendants, or to do any of the defendants serious bodily harm, you are instructed that you take said threats into consideration, in order to determine who most likely began the combat; but that defendants would not be justified on account of said threats in taking the life of said Cross, unless said Cross, at the time he was killed, did some act, showing an intent on his part to kill or seriously harm some of the defendants, or that his acts, then done, so appeared to the defendants from their standpoint.

73 The instructions above given are limited, so far as the evidence is concerned, by the following instructions:

The portions of Attorney-General Bradford's report were admitted in evidence to be considered by you as to whether or not the statements therein contained were made by the parties to said Bradford, said Bradford now being the attorney for the defendants, and denying the truth of the statements therein contained; and as to whether or not these statements were ever made to said Bradford, is a question of fact to be considered by you from all the evidence upon that subject; and if you believe the statements were not so made to said Bradford, you are to disregard the same. But if you believe from the evidence they were so made to said Bradford, then you are instructed to consider them as evidence, but only as to such parties by whom they were made.

You are instructed that the acts and admissions of any of the defendants after the homicide was committed, would only be admissible against the defendant so making the same, and those defendants that were present and not denying the admissions so made, if you find that any were so made, or any were so present.

You are instructed that the letter published in the Liberal Leader, purporting to be signed by C. E. Cook, is admitted in evidence in this manner: Said Cook denies that he wrote said letter, and you have heard the evidence of the said Winsteap in regard to said letter. You will first determine whether said Cook wrote said letter, and if he did not, you will

disregard it in toto. But if you find that he wrote said letter, then
74 you will consider it as evidence in this case; but it would only apply to C. E. Cook, and not to any of the other defendants.

If you believe that Sam Robinson made any statement in the presence of Reed or Freeman, by which he admitted that he and defendants had killed said Cross, then you are instructed not to regard nor consider said statement as evidence against any of the defendants on trial in this cause unless you find that the defendants, or some one of them, were present at the time said statement or statements were made, and did not deny the same; and you will only consider it as to such defendants or defendants so present, as above stated, if you should believe from the evidence that such statements were so made and any of defendants were present.

The evidence of Taylor Fox was only admitted to be considered by you with reference to such of the defendants, if any, as were shown to have participated in the acts by him testified, in so far as the bringing of the bodies of the dead through Hugoton; and if you believe from the evidence that none of the defendants caused said act to be done you will disregard said evidence in toto. But if you believe from the evidence that any of the defendants caused said act to be done, then you will consider it only as to such defendants, and none others.

The evidence of the difficulty between Ed. Short and Sam Robinson in Hugoton, and the attempted arrest of Sam Robinson by Ed. Short on Gough Creek, was only admitted for the purpose of showing whether the parties leaving Hugoton for No Man's Land believed said Short was liable
75 to murder said Robinson instead of arresting him, and for the purpose of showing for what motive they went to No Man's Land.

All other facts and circumstances admitted in evidence, not connected strictly with the killing, were only admitted for the special purpose stated at the time said evidence was admitted, and you will only consider the same for the purpose for which it was admitted. You are the sole and exclusive judges of the weignt of the evidence and the credibility of the witnesses.

The defendants are presumed to be innocent until their guilt is established by legal evidence beyond a reasonable doubt; and if from the whole evidence of this case you have a reasonable doubt of the defendants' guilt, you will acquit said defendants. But if the evidence satisfies your minds beyond a reasonable doubt of the guilty of the defendants as charged in the indictment, or any of the defendants so charged, then you should convict such defendant or defendants as to whose guilty you have no doubt, as above defined.

If you should believe any of the defendants guilty of an offense, but have a doubt as to whether it be murder or manslaughter, then it is your duty to resolve said doubt in favor of the defendants, and find them guilty of manslaughter.

If you find the defendants, or any of them, guilty of murder, your verdict will be as follows: "We, the jury, find defendants [here insert the names] guilty of murder, as charged in this indictment."

If you find the defendants not guilty, you will so say by your verdict.

You are instructed that if you believe, from the evidence, that
76 some of the defendants are guilty of murder, some of manslaughter, and some not guilty, that it is your duty to return your verdict,

showing what persons are guilty of murder, what guilty of manslaughter, and what persons not guilty of any offense.

In arriving at your decision in this case, you are instructed to weigh the evidence for the Government and for the defense calmly and deliberately, and to be governed by no feeling of sympathy nor prejudice, but to weigh the evidence conscientiously, being governed by the rules above defined.

If you have any doubt of the defendants' guilt, you are to give them the benefit of the same, as above stated; but if you have no doubt of their guilt, or any of them, it is your duty to return your verdict accordingly.

The case is with you.

(Signed) DAVID E. BRYANT,
Judge Eastern District of Texas.

When I gave this charge I asked the counsel of the Government and defendants if they desired any additional charge or charges, and the counsel on both sides stated that they did not desire any additional charges.

(Signed) DAVID E. BRYANT, *Judge.*

The following paragraphs of the court's charge were then and there excepted to by the defendants, and each of them:

"If you believe from the evidence that John M. Cross was murdered in No Man's Land or the Neutral Strip, as hereinafter defined, prior to Oct. 31st, 1889, you instructed that said No Man's Land or Neutral Strip, is within the jurisdiction of this court, and if the parties so killing
77 said Cross have committed any offense they can be tried and punished in this court"—

—for the reason that it is violative of the sixth amendment to the Federal Constitution; and for the further reason that it assumes that John M. Cross was murdered.

That part of the court charge to the jury in defining express malice:

"All persons are principals in the commission of a crime if they are present at the time it is committed, and, knowing the unlawful intent of the party who actually committed the crime, consent, procure, advise, or assist in the commission of the same."

"By the term presence as above used is not meant that each of the defendants must have been actually and physically at the place, and at the time John M. Cross was killed; but if they were near the place when and where the crime was committed, and knew of the criminal intent of the person or persons who actually did the killing, and were there for the purpose of aiding in the commission of said crime by acts if occasion demanded, or for the purpose of encouraging by their presence the person or persons committing said crime, though so acting, would be legally present at the commission of said offense and would be principals in its commission; or if any of the defendents were at such distance that they could not aid in the actual commission of the offense, but at the time the offense was committed they were then doing some act in furtherence of the criminal design to take the life of John M. Cross, then such persons would also be principals."

"If you believe from the evidence that John M. Cross was killed at the time and place and in the manner and by the means charged, and should also believe that the defendants, or either of them, was present at

said killing, but that the defendant did not aid or encourage such
78 killing, or did not know of the unlawful intent of the party actually doing the killing, in that event you are instructed that defendants would not be guilty; and you will so find."

"If you believe from the evidence that John M. Cross was killed at the time, place, and in the manner and by the means charged in the indictment, and that defendants were approaching the hay-stacks at the time said Cross was killed, but do not believe that the defendants did said killing in person, and do not believe that said defendants were acting in connection with the parties that did the killing, as above defined, in that event you are instructed that defendants would not be guilty; and you will so find."

"If you believe from the evidence that as defendants approached the hay-stacks, John M. Cross, or any of his party, or any person at said hay-stacks, fired upon the defendants, or did any act showing an intention to take the life of any of the defendants, or to inflict upon any of the defendants serious bodily harm, and that defendants returned said fire, or fired to prevent such threatened danger, and that said Cross was thus killed, you are instructed that such killing would be justifiable homicide, and find defendants not guilty."

"If you believe from the evidence that John M. Cross had threatened to take the life of any of the defendants, or to do any of the defendants serious bodily harm, you are instructed that you take such threats into consideration in order to determine who most likely began the combat; but that defendants would not be justified on account of said threats in taking the life of said Cross, unless said Cross, at the time he was killed, did some act showing an intent on his part to kill or seriously harm some of the defendants, or that his acts, then done, so appeared to the defendants from their standpoint."

79 "The instructions above given are limited, so far as the evidence is concerned, by the following instructions:

"The portions of Attorney-General Bradford's report were admitted in evidence to be considered by you as to whether or not the statements therein contained were made by the parties to said Bradford; said Bradford now being attorney for the defendants, and denying the truth of the statements therein contained; and as to whether or not these statements were ever made to said Bradford, is a question of fact to be considered by you from all the evidence upon that subject; and if you believe the statements were not so made to said Bradford, you are to disregard the same. But if you believe from the evidence they were so made to said Bradford, then you are instructed to consider them as evidence, but only as to such by whom they were made."

"The evidence of Taylor Fox was only admitted to be considered by you with reference to such of the defendants, if any, as were shown to have participated in the acts by him testified, in so far as the bringing of the dead bodies through Hugoton; and if you believe from the evidence that none of the defendants caused the said act to have been done, you will disregard said evidence in toto. But if you believe from the evidence that any of the defendants caused the said act to be done, then you will consider it only as to such defendants, and to none others."

And be it further remembered, that on the 8th day of July, 1890, the jury returned into open court the following verdict:

"We, the jury, would respectfully represent to your Honor that we find C. E. Cook, J. B. Chamberlain, O. J. Cook, Cyrus Frease, J. Lawrence and John J. Jackson guilty of murder as charged in the indictment. We find Wm. O'Connor, A. M. Donald, Smith Grubb, J. W. Calvert and Jno. A. Rutter, not guilty.

"As to Ed. Bowden, we agree that it is a mistrial.

"JNO. L. BALLINGER, *Foreman.*

"JULY 8, 1890."

80 Which verdict was received into open court by the court, and upon which the following judgment was rendered by the court, to wit:

[The judgment will appear in the record filed upon writ of error.] "B."

And be it further remembered that after the said verdict and judgment was thereon rendered, the defendants, and each of them, filed their motion for a new trial, in words and figures as follows:

UNITED STATES
vs.
SAMUEL ROBINSON AND TWENTY-NINE OTHERS. } No. 20.

In the United States circuit court for the eastern district of Texas, holding session at Paris, Texas.

The defendants, C. E. Cook, O. J. Cook, J. B. Chamberlain, Cyrus Frease, John Jackson, and J. Lawrence, they and each of them come and move the court to set aside the verdict in this case, and grant them a new trial, upon the following grounds, to wit:

1st. The court erred in making the order for a special venire of sixty men in this case on the 3d day of June, 1890, or in making any other order in the case at this term of this court; because the Hon. C. B. Sabin, United States district judge for the eastern district of Texas, died on or about the 2d day of April, 1890, and before the commencement of the present term of this court, and thereby the office of district judge of this district became vacant, and all the proceedings in this court, including this case, were continued by law until the next stated term after the appointment and qualification of Judge Bryant.

2d. The court erred in overruling the defendants' challenge to the
81 array of jurors, summoned under the order of court of date June 3, 1890, and named in the special venire served on the defendants, as shown by defendants' bill of exceptions.

3d. The court erred in refusing to allow the defendants the regular panel of jurors summoned and in attendance upon the court at this term, from which to select and complete the jury, after the special venire summoned under the order of the court, of date June 3d, 1890, had been exhausted, and in compelling the defendants to complete the jury from a venire of sixty men not drawn by the clerk and commissioner, as required by law as shown by the defendants' bill of exceptions.

4th. The court erred in refusing to have the jury impaneled and sworn according to the requirements of the statutes of Texas.

5th. The court erred in excluding from the jury the testimony of W. S. Stehle, offered by defendants, of threats of deceased, John M. Cross, against defendant Sam Robinson, as shown by defendants' bill of exceptions.

6th. The court erred in refusing to allow the witness Oren Shirley to be sworn and testify in the cause, and in depriving these defendants of the testimony of said witness before the jury, as shown by the defendants' bill of exceptions.

7. The court erred in excluding from the jury the conversation and statement of deceased, John M. Cross, to witness S. W. Dunn, as shown by defendants' bill of exceptions.

8th. The court erred in excluding from the jury the threats of the deceased, John M. Cross, against Sam Robinson and some of these defendants, made to witness P. H. Furguson, as shown by defendants' bill of exceptions.

9th. The court erred in excluding from the jury the conversation between the deceased, John M. Cross, and the witness L. A. Hyatt,
82 on the night before the killing as sworn by the defendants' bill of exceptions.

10th. The court erred in excluding from the jury the testimony of Noah Legg as to the statements of deceased, John M. Cross, to the witness, and for what purpose the deceased sent the said witness, on the 25th day of July, 1888, from the camp on Gough Creek to Moscow, Kansas, as shown by the defendants' bill of exceptions.

11th. The court erred in admitting in evidence the letter purporting to have been written by the defendants' witness Elmer McNeely to S. N. Wood, in regard to being subpœnaed in this case as a witness, as shown by defendants' bill of exceptions.

12th. The court erred in admitting the testimony of Taylor Fox as to his having been shot at by one Feasor on the next day after the deceased, John M. Cross, was killed; and as to his having been taken to Hugoton against his will; and as to the declarations and threats of the defendants O'Connor and Donald, against Wood and Short, on the next day after the killing, as shown by the defendants' bill of exceptions.

13th. The court erred in admitting the evidence of the witness Le Doux, as to the declarations, statements, and threats of some of the defendants against the witness Le Doux, and the people of Voorhies, Kansas, as shown by defendants' bill of exceptions.

14th. The court erred in allowing the prosecution to ask the witness Scott if he had not offered the witness Keen Haws two hundred dollars to go to Kentucky, and then permitting the prosecution to show by Keen Haws that Scott had made such an offer; and the court erred in refusing to allow the defendants C. E. Cook and A. M. Donald, when testifying as witnesses for themselves and the other defendants, to state what the conversation was between C. E. Cook and Keen Haws at McPherson, Kansas, and to explain to the jury what, if anything, was said by
83 Cook to the witness Haws about paying him to testify for defendants, as shown by the defendants' bill of exceptions.

15th. The court erred in admitting in evidence, over the objections of the defendants' counsel, portions of an article published in the Liberal Leader, purporting to have been signed by C. E. Cook, as shown by the defendants' bill of exceptions.

16th. The court erred in permitting the counsel for the Government to read from the report of Attorney-General Bradford, in the hearing of the jury, certain statements, and then ask the witness Bradford if he did not make the statement so read in said report; and the court erred in admitting in evidence, over the objection of defendents, certain parts of said report; and, after allowing the Government to read a part of the report in evidence, the court erred in refusing to allow the defendants to read in evidence another part of the report—all of which is shown in the defendants' bill of exceptions.

17th. The court erred in the following part of the charge to the jury: "If you believe from the evidence that John M. Cross was murdered in No Man's Land or the Neutral Strip, as hereinafter defined, prior to October 31st, 1889, you instructed that said No Man's Land or Neutral Strip is within the jurisdiction of this court, and if the parties so killing said Cross have committed any offense, they can be tried and punished in this court," for the reason that it is violative of the sixth amendment to the Federal Constitution, and for the further reason that it assumes that John M. Cross was murdered.

18th. The court erred in its charge to the jury in defining express malice.

19th. The court erred in charging the jury as follows: "All persons are principals in the commission of a crime if they are present at the time it is committed, and, knowing the unlawful intent of the party who actually commits the crime, consent, procure, advise, or assist in the commission of the same."

84 20th. The court erred in the following paragraph of the charge: "By the term 'present,' as above used, is not meant that each of the defendants must have been actually and physically at the place and at the time John M. Cross was killed; but if they were near the place when and where the crime was committed, and knew of the criminal intent of the person or persons who actually did the killing, and were there for the purpose of aiding in the commission of said crime by acts if occasion demanded, or for the purpose of encouraging by their presence the person or persons so committing said crime, though so acting, would be legally present at the commission of said offense, and would be principals in its commission; or, if any of the defendants were at such a distance that they could not aid in actual commission of the offense, but at the time the offense was committed they were then doing some act in the furtherance of the criminal design to take the life of John M. Cross, then such persons would also be principals.

21st. The court erred in the following paragraphs of the charge: "If you believe from the evidence that John M. Cross was killed at the time and place and in the manner and by the means charged, and should also believe that the defendants, or either of them, was present at said killing, but that the defendants did not aid or encourage such killing, or did not know of the unlawful intent of the party actually doing the killing, in that event you are instructed that defendants would not be guilty; and

you will so find." * * * "If you believe from the evidence that John M. Cross was killed at the time and place and in the manner and by the means charged in the indictment, and that the defendants were approaching the hay-stacks at the time Cross was killed, but do not believe that the defendants did said killing in person, and do not believe that said defendants were acting in connection with the parties that did
85 the killing as above defined, in that event you are instructed that the defendants would not be guilty; and you will so find."

22d. The court erred in instructing the jury as follows: "If you believe from the evidence that as defendants approached the hay-stacks John M. Cross, or any of his party, or any person at said hay-stacks, fired upon the defendants, or did any act showing an intention to take the life of any of the defendants, or inflict upon any of the defendants serious bodily harm, and that defendants returned said fire, or fired to prevent such threatened danger, and that said Cross was thus killed, you are instructed that such killing would be justifiable homicide, and find defendants not guilty." * * * "If you believe from the evidence that John M. Cross had threatened to take the life of any of the defendants, or to do any of the defendants serious bodily harm, you are instructed that you take said threats into consideration in order to determine who most likely began the combat; but that defendants would not be justified on account of said threats in taking the life of said Cross, unless said Cross at the time he was killed did some act showing an intent upon his part to kill or seriously harm some of the defendants, or that his acts, then done, so appeared to the defendants from their standpoint." * * * "The instructions given above are limited by the following instructions: The portions of Attorney-General Bradford's report were admitted in evidence to be considered by you as to whether or not the statements therein contained were made by the parties to said Bradford, said Bradford now being the attorney for the defendants, and denying the truth of the statements therein contained; and as to whether or not these statements were ever made to said Bradford is a question of fact to be considered by you from all the evidence upon that subject; and if you believe the statements were not so made to said Bradford, you are to disregard the same. But if you believe from
86 the evidence they were so made to Bradford, then you are instructed to consider them as evidence, but only as to such parties by whom they were made."

23d. The court erred in further instructing the jury as follows: The evidence of Taylor Fox was only admitted to be considered by you with reference to such of the defendants, if any, as were shown to have participated in the acts by him testified, in so far as the bringing of the dead bodies through Hugoton; and if you believe from the evidence that none of the defendants caused said acts to be done, you will disregard said evidence in toto. But if you believe from the evidence that any of the defendants caused said act to be done, then you will consider it only as to such defendants, and none others."

24th. The court erred in receiving the verdict from the jury and reading it, when there was a mistrial as to a part of these defendants, then returning it to the jury, and afterwards receiving and having a different verdict returned into court, whereby four of these defendants, as to whom there was a mistrial by the former verdict, were convicted.

25th. There was no evidence showing that the crime with which these defendants, or either of them, are charged and have been convicted, was committed in the eastern district of Texas, and there was no evidence to show that Wild Horse Lake, where the killing took place, was in the jurisdiction of this court.

26th. The verdict of the jury is contrary to the evidence in this, the evidence of the eye witnesses for the Government is conflicting; does not show that all these defendants were present at the killing, or that they participated in or had anything to do with the killing; and there is no charge or proof of conspiracy; and the verdict is not sustained by sufficient evidence.

HODGES, POLLARD & HODGES, AND
DUDLEY & MOORE,
Attorneys for the Defendants.

87 Which motion for a new trial came on to be heard by and before the said court at said term, and was, by said court, during said term, to wit, on July 17, 1890, and in open court, overruled, and the defendants, and each of them, refused a new trial; to which judgment and order the defendants, and each of them, in open court, then and there excepted.

And be it further remembered that, after defendants' motion for a new trial was overruled, the defendants, and each of them, at and during said term of the court, and on the same day, moved in arrest of judgment on the following grounds:

THE UNITED STATES
vs.
SAMUEL ROBINSON AND TWENTY-NINE OTHERS. } No. 20.

In the United States circuit court for the eastern district of Texas, at Paris, Texas.

And now come C. E. Cook, O. J. Cook, J. B. Chamberlain, John Jackson, Cyrus Frease, and J. Lawrence, who are defendants in the above-entitled cause, and they, and each of them, move the court to arrest the judgment of conviction against them in said cause, upon the following grounds, to wit:

1st. This court had no jurisdiction to try these defendants, or either of them, for the crime alleged in the bill of indictment against them; because the strip of country known as No Man's Land, where the crime with which they are charged is alleged to have been committed, was not embraced in, and did not, at the time of the alleged crime, belong to any United States judicial district which had been previously ascertained by law.

2d. Because the crime with which they, and each of them, are charged in the bill of indictment, and of which they have been convicted,
88 is not alleged or shown to have been committed in the eastern district of Texas, but, on the contrary, it appears affirmatively that the country where the crime is charged to have been committed did not belong to, and formed no part of, the eastern district of Texas at the time of the commission of the crime, but since has been attached to and made a part of such district.

3d. Because, if such strip of country, known as No Man's Land, at the time of the commission of the crime, belonged to any United States district which had been previously ascertained by law, the defendants, and each of them, had a constitutional right to be tried in such district so ascertained; and this court had no jurisdiction to try these defendants, or either of them, and is without authority or jurisdiction to enter judgment upon the verdict of the jury.

4th. The trial and all proceedings in this case at this term of the court, including the verdict of the jury, is a nullity, for the reason that, upon the death of the Hon. C. B. Sabin, United States district judge for the eastern district of Texas, said office became vacant, and all the proceedings of this court, including this case, was continued, of course, under the law until the next stated term after the appointment and qualification of his successor, and neither Judge Boarman nor Judge Bryant had any power to open, organize, or hold the present term of this court, at which this case was tried.

5th. The bill of indictment does not charge the crime of murder. It does not allege when the deceased, John M. Cross, died, or that he died within a year and a day from the time of the infliction of the mortal wounds, or that the wounds alleged caused his death, or that the deceased died within the territory in the jurisdiction of this court.

HODGES, POLLARD & HODGES, AND
DUDLEY & MOORE,
Attorneys for Defendants.

89 Which motion in arrest of judgment came on to be heard by and before the said court at said term, and was by said court on the same of its overruling of the motion for a new trial, to wit, on July 17th, 1890, in open court overruled, and its motion denied; to which ruling and judgment of the court the defendants, and each of them, in open court, then and there excepted.

And be it further remembered that on the 18th day of July, 1890, the United States district attorney for the eastern district of Texas moved for sentence upon each of the defendants in accordance with the verdict and judgment of the court, which motion was granted; and thereupon, on the 18th day of July, 1890, it was ordered and adjudged by the court that each of the defendants, to wit, C. E. Cook, O. J. Cook, J. B. Chamberlain, Cyrus Frease, John J. Jackson, and J. Lawrence, be remanded to the custody of the United States marshal for the eastern district of Texas until the 19th day of December, A. D. 1890, and that on said day each of the said defendants, at some place to be arranged by said marshal, at Paris, Texas, be by said marshal hanged by the neck until he is dead, in the following words and figures, to wit:

THE UNITED STATES
vs. } No. 20.
C. E. COOK.

This day, this cause being called, the United States, by the United States attorney, appeared, and the defendant, C. E. Cook, in his own proper person and by attorneys, appeared, and the defendant C. E. Cook being asked by the court in open court if he had anything to say why the judgment and the

sentence of the court should not be pronounced upon him in accordance with the verdict of the jury rendered in this cause on a former day
90 of this term, to wit, the 8th day of July, A. D. 1890, and the judgment of the court entered thereon; and no good cause being shown in bar thereof, it is ordered and adjudged by the court that the defendant C. E. Cook, who has been adjudged guilty of murder, shall, on Friday, the nineteenth day of December, A. D. 1890, between the hours of ten o'clock a. m. and four o'clock p. m., in the city of Paris, in Lamar County, Texas, be hung by the neck until he is dead.

And the clerk of this court is ordered to issue a death warrant in accordance with this sentence, which shall be directed and delivered to the marshal of the eastern district of Texas, who shall execute the same according to law. And the defendant C. E. Cook is now remanded to the jail of Lamar County, to await the execution of this sentence.

DAVID E. BRYANT, *Judge*.

Done in open court this July 18, 1890.

THE UNITED STATES } No. 20.
vs.
O. J. COOK.

This day, this cause being called, the United States, by the United States attorney, appeared, and the defendant, in his own proper person and by attorneys, appeared, and the defendant O. J. Cook being asked by the court in open court if he had anything to say why the judgment and the sentence of the court should not be pronounced upon him in accordance with the verdict of the jury rendered in this cause on a former day of this term, to wit, the 8th day of July, A. D. 1890, and the judgment of the court entered thereon; and no good cause being shown in bar thereof, it is therefore ordered and adjudged by the court that the defendant O. J. Cook, who has been adjudged guilty of murder, shall, on Friday, the nineteenth day of December, A. D. 1890, between the hours of ten o'clock a. m. and four o'clock p. m., in the city of Paris, in Lamar County, Texas, be hung by the neck until he is dead.

And the clerk of this court is ordered to issue a death warrant in accordance with this sentence, which shall be directed and delivered to the marshal for the eastern district of Texas, who shall execute the same according to law. And the defendant O. J. Cook is now remanded to the jail of Lamar County, to await the execution of this sentence.

DAVID E. BRYANT, *Judge*.

Done in open court this July 18, 1890.

91 THE UNITED STATES } No. 20.
vs.
CYRUS FREASE.

This day, this cause being called, the United States, by the United States attorney, appeared, and the defendant, in his own proper person and by attorneys, appeared, and the defendant Cyrus Frease being asked by the court in open court if he had anything to say why the judgment and the sentence of the court should not be pronounced upon him in accordance with the verdict of the jury rendered in this cause on a former

day of this term, to wit, the 8th day of July, A. D. 1890, and the judgment of the court entered thereon; and no good cause being shown in bar thereof, it is ordered and adjudged by the court, that the defendant Cyrus Frease, who has been adjudged guilty of murder, shall, on Friday, the nineteenth day of December, A. D. 1890, between the hours of ten o'clock a. m. and four o'clock p. m., in the city of Paris, in Lamar County, Texas, be hung by the neck until he is dead.

And the clerk of this court is ordered to issue a death warrant in accordance with this sentence, which shall be directed and delivered to the marshal for the eastern district of Texas, who shall execute the same according to law. And the defendant John J. Jackson is now remanded to the jail of Lamar County, to await the execution of this sentence.

DAVID E. BRYANT, *Judge.*

Done in open court, this July 18, 1890.

THE UNITED STATES } No. 20.
vs.
J. B. CHAMBERLAIN.

This day, this case being called, the United States by the United States attorney appeared, and the defendant, J. B. Chamberlain, in his own proper person and by attorneys, appeared, and the defendant J. B. Chamberlain being asked by the court in open court if he had anything to say why the judgment and the sentence of the court should not be pronounced upon him in accordance with the verdict of the jury rendered in this cause on a former day of this term, to wit, the 8th day of July, A. D. 1890, and the judgment of the court entered thereon; and no good cause being entered in bar thereof, it is ordered and adjudged by the court, that the defendant J. B. Chamberlain, who has been adjudged guilty of murder, shall, on Friday, the nineteenth day of December, A. D. 1890,
92 between the hours of ten o'clock, a. m. and four o'clock p. m., in the city of Paris, in Lamar County, Texas, be hung by the neck until he is dead.

And the clerk of this court is ordered to issue a death warrant in accordance with this sentence, which shall be directed and delivered to the marshal for the eastern district of Texas, who shall execute the same according to law. And the defendant J. B. Chamberlain is now remanded to the jail of Lamar County, to await the execution of this sentence.

DAVID E. BRYANT, *Judge.*

Done in open court, this July 18, 1890.

THE UNITED STATES } No. 20.
vs.
JOHN J. JACKSON.

This day, this cause being called, the United States, by the United States attorney appeared, and the defendant, in his own proper person and by attorneys, appeared, and the defendant John J. Jackson being asked by the court in open court if he had anything to say why the judgment and the sentence of the court should not be pronounced upon him in accord-

ance with the verdict of the jury rendered in this cause on a former day of this term, to wit, the 8th day of July, A. D. 1890, and the judgment of the court entered thereon; and no good cause being shown in bar thereof, it is therefore ordered and adjudged by the court, that the defendant John J. Jackson, who has been adjudged guilty of murder, shall, on Friday, the nineteenth day of December, A. D. 1890, between the hours of ten o'clock a. m. and four o'clock p. m., in the city of Paris, in Lamar County, Texas, be hung by the neck until he is dead.

And the clerk of this court is ordered to issue a death warrant in accordance with this sentence, which shall be directed and delivered to the marshal for the eastern district of Texas, who shall execute the same according to law. And the defendant John J. Jackson is now remanded to the jail of Lamar County, to await the execution of this sentence.

DAVID E. BRYANT, *Judge.*

Done in open court, this July 18, 1890.

THE UNITED STATES *vs.* J. LAWRENCE. } No. 20.

This day, this cause being called, the United States, by the United States attorney appeared, and the defendant, in his own proper person
93 and by attorneys, appeared, and the defendant J. Lawrence being asked by the court in open court if he had anything to say why the judgment and the sentence of the court should not be pronounced upon him in accordance with the verdict of the jury rendered in this cause on a former day of this term, to wit, the 8th day of July, A. D. 1890, and the judgment of the court entered thereon; and no good cause being shown in bar thereof, it is therefore ordered and adjudged by the court, that the defendant J. Lawrence, who has been adjudged guilty of murder, shall, on Friday, the nineteenth day of December, A. D. 1890, between the hours of ten o'clock a. m. and four o'clock p. m. in the city of Paris, in Lamar County, Texas, be hung by the neck until he is dead.

And the clerk of this court is ordered to issue a death warrant in accordance with this sentence, which shall be directed and delivered to the marshal for the eastern district of Texas, who shall execute the same according to law. And the defendant J. Lawrence is now remanded to to the jail of Lamar County to await the execution of this sentence.

DAVID E. BRYANT, *Judge.*

Done in open court this 18th day of July, 1890.

And the United States circuit and district court for the eastern district of Texas, holding sessions at Paris, Texas, being about to adjourn for the term, and there appearing to the court good and sufficient cause and reasons for allowing the defendants in this cause, and each of them, time to file their petition in this court praying for a writ of error to remove the proceeding in this cause to the Supreme Court of the United States, that the final judgment rendered in this cause may be reëxamined, reversed, or affirmed by said Supreme Court of the United States on such

writ of error, the following order was made by the court in this cause, and entered of record:

[The order will appear in record on writ of error to effect that the court granted sixty days from the 19th day of July, A. D. 1890, to the defendants, and each of them, to file their petition for writ of error in this cause.]

94 To all of which acts, doings, rulings, orders, judgment, and sentence of the court, and to each and every one of them, the defendant, C. E. Cook, O. J. Cook, J. B. Chamberlain, Cyrus Frease, John J. Jackson, and J. Lawrence, and each of them, did then and there at the time and do now here except, and in open court here tender this their bill of exceptions, and the bill of exceptions for each of them, showing all such acts, doings, rulings, orders, judgments, and sentence of the court; and pray that the same may be signed and sealed by this court, and filed as a part of the record of this cause.

This bill of exceptions allowed in open court this July 19th, A. D. 1890.

Witness my hand and official signature day and year above written.

(Signed) DAVID E. BRYANT,
Judge of the U. S. District and Circuit Courts of the Eastern District of Texas.

(Endorsed:) No. 20. The United States *v.* Sam Robinson and 29 others. Bill of exceptions. Filed July 19, 1890. H. H. Kirkpatrick, clerk.

95 (Cover:) In the Supreme Court for the United States of America. C. E. Cook, O. J. Cook, Cyrus Frease, J. B. Chamberlain, John Jackson, and J. Lawrence, plaintiffs in error, *vs.* The United States, defendant in error. Assignment of error. Rossington, Smith & Dallas, Hodges, Pollard & Hodges, B. E. Johnston, attorneys for plaintiffs in error.

96 In the Supreme Court for the United States of America.

C. E. COOK, O. J. COOK, CYRUS FREASE, J. B. Chamberlain, John Jackson, and J. Lawrence, plaintiffs in error.
vs.
THE UNITED STATES, DEFENDANT IN ERROR.

Assignment of error.

And the said C. E. Cook, O. J. Cook, Cyrus Frease, J. B. Chamberlain, John Jackson, and J. Lawrence now come, and each of them severally for himself, and says: That a final judgment of the circuit court of the United States of America, within and for the eastern district of Texas, within the fifth circuit, sitting at Paris, Texas, was on the 18th day of July, A. D. 1890, rendered against them and each of them in a pretended proceeding by indictment found against them by a grand jury of said court,

charging them and each of them with having committed the crime
97 of murder on the 25th day of July, A. D. 1888, in the territory known as "No Man's Land" or the "Neutral Strip;" that they and each of them were sentenced to be hanged by the neck until they and each of them be dead; that the 19th day of December, A. D. 1890, was set and appointed for the execution of said sentence; that in the record and proceedings of the said circuit court in assuming jurisdiction and trying plaintiffs in error, and in the various rulings by said court made upon the trial thereof, receiving the verdict of the jury, rendering judgment, overruling plaintiffs in error, motions for a new trial and in arrest of judgment, and sentencing the said plaintiffs to be hung, as shown by the transcript thereof herein filed, there was and is great and manifest error to the injury of the plaintiffs in error and to the injury of each of them, which said errors the plaintiffs in error and each of them now sign and number as follows, to wit:

First. The Honorable Alex. Boarman had no authority to convene and hold a term of said court commencing on the 21st day of April, 1890, because, as shown by the record filed herein, the said Boarman was at that time the duly appointed and qualified district judge, in and for the western district of Louisiana, and not a Federal judge of a district in Texas; that the Honorable C. B. Sabin was the duly appointed and qualified
98 judge of the eastern district of Texas, up to and including the 30th day of March, 1890, on which last said day he died; that the office of district judge for the eastern district of Texas was vacant until the second day of June, 1890, when the honorable David E. Bryant, who had been appointed and confirmed, qualified by taking the oath of office as judge of the eastern district of Texas; that the Honorable David E. Bryant had no authority or power to transact the business of said court and try these plaintiffs in error at the said stated term.

Second. The court erred in making the order for a special venire of sixty men on the third day of June, 1890, to be summoned from Fannin and Red River Counties, exclusively, to serve as jurors in the trial of said cause, because these plaintiffs in error, by order of the court made and entered of record on the 29th day of June, 1890, had been served with copies of the venire of regular jurors summoned for the term of said court commencing on the 21st day of April, 1890.

Third. The court erred in overruling the plaintiffs in error's challenge to the array of jurors summoned under the order made June 3, 1890, because the plaintiffs in error had been served with a copy of the names of the regular venire drawn and summoned from the body of said district to serve at the said term of said court; because said array of jurors was drawn and summoned and lists of their names served on plaintiffs in error since they announced ready for trial on a former day of said
99 term of said court; because there had been no order made setting aside or challenging the array of jurors, a list of whose names was first served upon the plaintiffs in error as aforesaid; because said venire was summoned from Fannin and Red River Counties, and not from the body of the eastern district of Texas; because said jurors, a list of whose names was drawn and summoned to serve as jurors at the said term of said court and served upon plaintiffs in error, were teen in the court room, and no reason was shown why they should not serve as jurors in this case.

Fourth. The court erred in refusing to allow plaintiffs in error to have the regular panel of jurors who had been summoned and in attendance in court, called to complete the jury or disqualify or be challenged after the venire of sixty had been exhausted, and in ordering the marshal to summon fifty talesmen to complete said jury; because there was no power or authority in the court to order the marshal to summon jurors from the bystanders until from challenge or otherwise there is not a petit jury to determine any cause pending in a court; and because the regular panel of jurors for the term were in attendance upon the court, and had not by challenge or otherwise been determined to be incompetent jurors.

Fifth. The court erred in admitting the testimony of Taylor Fox, as to his having been shot at by one Feasor on the next day after the
100 deceased, John M. Cross, had been killed, and as to his having been taken to Hugoton against his will, and as to the declarations and threats of the defendants in the court below—O'Connor and Donald against Wood and Short—on the next day after the killing, and in overruling the plaintiffs in error's objections thereto as shown by record filed herein.

Sixth. The court erred in admitting the evidence of LeDaux as to the declarations, statements, and threats of some of the defendants in the court below against the witness LeDaux and the people of Voorhees, Kansas, and in overruling the plaintiffs in error's objections thereto as shown of record filed herein.

Seventh. The court erred in overruling the objections of the plaintiffs in error and admitting as evidence portions of an article published in the Liberal Leader, purporting to have been signed by C. E. Cook, one of the plaintiffs in error, because there was no evidence that C. E. Cook ever wrote said article; because witness Willsteap, who published said article, was unable to testify that he received the article by due course of mail; because there was no proof of any correspondence between Cook and said witness by mail, and did not know the handwriting of said Cook; and because said witness did not know that said Cook wrote said article, and because there was no predicate laid for its introduction for impeachment.

101 Eighth. The court erred in overruling the objections of plaintiffs in error and allowing the prosecution to ask the witness, Scott, if he had not offered the witness Keen Haws two hundred dollars to go to Kentucky, and then permitting the prosecution to show by Keen Haws that Scott made such an offer; and the court erred in refusing to allow the defendants, C. E. Cook and A. M. Donald, in the court below, when testifying as witnesses for themselves and other defendants, to state what the conversation was between C. E. Cook and Keen Haws at McPherson, Kansas, and to explain to the jury what, if anything, was said by Cook to the witness Haws about paying him to testify for defendants in court below, and sustaining the Government's objection thereto, as shown by record filed herein.

Ninth. The court erred in overruling the objections of plaintiffs in error and admitting in evidence the letter purporting to have been written by the defendants' witness, Elmer McNeeley, to S. N. Wood, in regard to being subpenaed in this case as a witness, as shown of record filed herein.

Tenth. The court erred in permitting the counsel for the Government to read from the report of Attorney-General Bradford in the hearing of the jury certain statements, then asked the witness Bradford if he did not make the statement so read in said report, and overruling the objections of plaintiffs in error thereto; and the court erred in admitting in evi-
102 dence, over the objections of plaintiffs in error, certain parts of said report, as shown of record filed herein, because said witness Bradford was placed upon the witness stand by the Government as a rebutting witness after counsel for Government knew what he would testify to, and said witness had testified as such rebutting witness to the exact facts that the Government's counsel had expected him to testify to; and because said witness had stated that plaintiff in error, C. E. Cook, did not state to him in language or in substance the statement contained in said report; because what witness stated in said report was not a report required of him in his official capacity as attorney-general of the State of Kansas. Neither said report nor any part thereof was relevant or competent, and is hearsay, and ought not to have been admitted in evidence.

Eleventh. The court erred in sustaining the objection of the Government and excluding from the jury the conversation and statement of deceased, John M. Cross, to witness S. W. Dunn, and excluding the testimony of said Dunn, to the effect that said Dunn was sheriff of Seward County, Kansas, and went to Woodsdale, Kansas, only a few days before the killing of John H. Cross, to arrest Bob Hubbard, who was killed at the same time that Cross was killed. That witness made his business known to Cross, and informed Cross that he, the witness, had a warrant for Hubbard, charging him with the offense of assault with intent
103 to kill. Cross first said, "I am now looking for Hubbard, and you can get him;" but later in the day Cross told witness that he, Cross, had had a good deal of trouble in Stevens County; that certain parties had given him dirt. He named the Cooks, Chamberlain, Calvert, and Sam Robinson (defendants below) as the parties who had given him dirt, and said he wanted to use Hubbard against the Hugoton fellows; that he thought that Hubbard was the kind of a man he wanted, and therefore he would rather the witness would not arrest him. That witness failed to get Hubbard. That the witness informed the defendants of this conversation and these facts before the killing of Cross. As shown of record filed herein.

Twelfth. The court erred in excluding from the jury the threats of the deceased, John M. Cross, against Sam Robinson and some of these plaintiffs in error, made to witness T. H. Ferguson, and sustaining the Government's objection thereto, and in excluding the testimony of witness T. H. Ferguson, to the effect that the witness and one John M. Cross (the deceased) used and occupied the same office together, and a short time before Cross was killed, Cross, in the office one day, speaking about the troubles they had had, said he "would kill Sam Robinson the first opportunity he got, and if the Cooks and Chamberlain did not look out, they would get what they did not want." And as shown of record filed herein.
104 Thirteenth. The court erred in excluding from the jury the testimony of W. S. Steele, offered by plaintiffs in error, of threats of deceased, John M. Cross, against Sam Robinson; that he, the witness, resided in Hugoton, Kansas, in July, 1888; that witness had a conversation

with deceased, John M. Cross, only a few days before he was killed; that in said conversation Cross made threats against the life of Sam Robinson, one of the parties indicted in this cause, but not on trial; that he heard Cross say a few days before he was killed that he, Cross, and defendant, Sam Robinson, could not live in the same county; that he had no warrant for Sam Robinson, and he did not want to arrest him, "But, God damn him, he would kill him." Witness testified to the court that he informed Sam Robinson of these threats the same day, but could not say that Cross made any threats against either of these defendants on trial. And in sustaining Government's objection thereto, as shown of record filed herein.

Fourteenth. The court erred in receiving a verdict from the jury, and reading it, when there was a disagreement as to some of these plaintiffs in error, then returning it to the jury, and afterward having and receiving a different verdict into the court, whereby four of these plaintiffs in error, as to whom there was a disagreement by the former verdict, were convicted, and in overruling the objections of the plaintiffs in error thereto, as shown of record filed herein.

Fifteenth. The court erred in refusing to allow the witness Oren Shirley to be sworn and testify in the cause, and in depriving these plaintiffs in error of the testimony of said witness in said trial, to the effect that witness had a conversation with deceased, Cross, only a few days before he was killed, in which Cross said to witness, "If Sam Robinson didn't let him alone, he would fill his hide so full of shot it wouldn't make a sieve; and that Chamberlain had better look out, or he would get him, too." As shown of record filed herein.

Sixteenth. The court erred in sustaining the Government's objection and excluding from the jury the testimony of Noah Legg, as to the statements of the deceased, John M. Cross, to the witness, and for what purpose the deceased sent the said witness on the 25th day of July, 1888, from the camp on Gough Creek to Moscow, Kansas, as shown of record filed herein.

Seventeenth. The court erred in the following part of the charge to the jury, and in overruling the objections of plaintiffs in error thereto: "If you believe from the evidence that John M. Cross was murdered in No Man's Land or the Neutral Strip, as hereinafter defined, prior to October 31, 1889, you are instructed that No Man's Land or Neutral Strip is within the jurisdiction of this court, and if the party so killing said Cross have committed any offense, they can be tried and punished in this court." As shown by the record filed herein.

Eighteenth. The court erred in the charge to the jury in defining express malice, as shown by the record filed herein.

Nineteenth. The court erred in overruling the defendants' objection and charging the jury as follows: "All persons are principals in the commission of crime if they are present at the time that it is committed, and, knowing the unlawful intent of the party who actually commits the crime, consent, procure, advise, or assist in the commission of the same."

Twentieth. The court erred in overruling the objection of the plaintiffs in error to the following paragraph of the charge to the jury: "By the term 'present,' as above used, is not meant that each of the defendants must have been actually and physically at the place and at the time John M. Cross was killed; but if they were near the place when and where the

crime was committed, and knew of the criminal intent of the person or persons who actually did the killing, and were there for the purpose of aiding in the commission of the crime by acts if occasion demanded, or for the purpose of encouraging by their presence the person or persons so committing said crime, though so acting, would be legally present
107 at the commission of the offense, and would be principals in the commission; or if the defendants were at such a distance that they could not aid in actual commission of the offense, but at the time the offense was committed they were then doing some act in the furtherance of the criminal design to take the life of John M. Cross, then such persons would also be principals." As shown by the record filed herein.

Twenty-first. The court erred in overruling the objections of plaintiffs in error to the following paragraph of the charge to the jury: "If you believe from the evidence that John M. Cross was killed at the time and place and in the manner and by the means charged, and should also believe that the defendants, or any of them, were present at said killing, but that the defendants did not aid or encourage such killing, or did not know of the unlawful intent of the party actually doing the killing, in that event you are instructed that defendants would not be guilty; and you will so find." * * * "If you believe from the evidence that John M. Cross was killed at the time and place and in the manner and by the means charged in the indictment, and that the defendants were approaching the haystacks at the time Cross was killed, but do not believe that defendants did the killing in person, and do not believe that defendants were acting in connection with parties who did the killing as above de-
108 fined, in that event you are instructed that the defendants would not be guilty; and you will so find." As shown of record filed herein.

Twenty-second. The court erred in overruling the objections of plaintiffs in error in instructing the jury as follows: "If you believe from the evidence that as the defendants approached the hay-stacks that John M. Cross or any one of his party or any person at said hay-stacks fired upon said defendants, or did any act showing an intention of taking the life of any of the defendants or inflict upon any of the defendants serious bodily harm, and that defendants returned said fire or fired to prevent such threatened danger, and that said Cross was thus killed, you are instructed that such killing would be justifiable homicide, and find the defendants not guilty." * * *

"If you believe from the evidence that John M. Cross had threatened to take the life of any of the defendants, or to do any of the defendants serious bodily harm, you are instructed that you shall take such threats into consideration in order to determine who most likely commenced the combat; but that such defendants would not be justified on the account of said threats in taking the life of the said Cross, unless said Cross at the time he was killed did some act showing an intent on his part to kill or seriously harm some of the defendants, or that his acts then done so appeared to the defendants from their standpoint." * * *

109 "The instructions given above are limited by the following instructions: The portions of Attorney-General Bradford's report were admitted in evidence to be considered by you whether or not the statements therein contained were made by the parties to said Bradford, said Bradford now being the attorney for the defendants and denying the truth of the

statements therein contained; and as to whether or not these statements were ever made to said Bradford, is a question of fact to be considered by you from all the evidence upon that subject; and if you believe the statements were not so made to said Bradford, you are to disregard the same; but if you believe from the evidence that they were so made to Bradford, then you are instructed to consider them as evidence, but only as to such parties by whom they were made." As shown by the record filed herein.

Twenty-third. The court erred in overruling the objections of plaintiffs in error, and in further instructing the jury as follows: "The evidence of Taylor Fox is only admitted to be considered by you with reference to such of the defendants, if any, as were shown to have participated in the acts by them testified, in so far as bringing of the dead bodies through Hugoton; and if you believe from the evidence that none of the defendants caused said act to be done, you will disregard said evidence in toto. If you believe from the evidence that any of the defendants caused said act
110 to be done, then you will consider it only as to such defendants and none others." As shown by the record filed herein.

Twenty-fourth. There was no evidence showing that the crime with which these plaintiffs in error, or either of them, were charged and have been convicted, was committed in the eastern district of Texas; and there is no evidence to show that Wild Horse Lake, where the killing took place, was within the jurisdiction of this court, as shown by the record filed herein.

Twenty-fifth. The verdict of the jury is contrary to the evidence, in that the evidence of the eye-witnesses of the Government is conflicting, does not show that all of these plaintiffs in error were present at the killing, or that they participated in or had anything to do with the killing, and there is no charge or proof of conspiracy; and the verdict is not sustained by sufficient evidence, as shown by the record filed herein.

Twenty-sixth. The court erred in assuming jurisdiction of and trying plaintiffs in error for an offense alleged to have been committed in the Neutral Strip or No Man's Land, the 25th day of July, 1888, because on the 25th day of July, 1888, said Neutral Strip or No Man's Land was not attached to any judicial district of the United States for judicial purposes by any statute or law then in force; because the court at Paris, Texas, was created by an act of Congress approved —— day of March,
111 1889, long after the alleged commission of said offense; because the said act of 1889 does not in terms or by implication attach said No Man's Land to the eastern district of Texas for judicial purposes; because there is an extensive region of country lying between said No Man's Land and the extreme western boundary of the eastern district of Texas as fixed by law; that at the time of the alleged commission of the alleged offense, and at the time of the creation of the said court at Paris, said land so lying between was attached to another judicial district of the United States for judicial purposes; that said No Man's Land did not join and was not contiguous to the boundaries of the eastern district of Texas as fixed by law.

Twenty-seventh. The court erred in overruling the defendants' motion for a new trial, and each of the grounds stated therein, as shown by the record filed herein.

Twenty-eighth. The court erred in overruling the defendants' motion in arrest of judgment, and each of the grounds therein stated, as shown by

the record filed herein, and especially the fifth ground stated therein; that the bill of indictment does not charge the crime of murder; does not allege when the deceased John M. Cross, died, or that he died within a year and a day of the infliction of a mortal wound, or that he died from the effect of said wound, or that he died within the territory in the jurisdiction of the court in which plaintiffs in error were tried.

112 Twenty-ninth. That the court erred in each of the rulings and all of the rulings complained of by the plaintiffs in error, as shown by the several subdivisions of their bill of exceptions allowed by the court of record filed herein.

And the said C. E. Cook, O. J. Cook, Cyrus Frease, J. B. Chamberlain, John Jackson, and J. Lawrence, and each of them, pray that the judgment aforesaid may be reversed and annulled, and absolutely held for nothing; and that they, and each of them, may be restored to all things which they or either of them have lost by reason of the premises aforesaid.

By ROSSINGTON, SMITH & DALLAS,
HODGES, POLLARD & HODGES, &
B. E. JOHNSTON,
Attys. for Pltfs. in Error.

(Endorsed): The United States vs. Sam'l Robinson & others. No. 20. Assignment of errors. Filed Sept. 6, 1890. H. H. Kirkpatrick, clerk.

113 In the circuit court of the United States, in and for the eastern district of Texas, sitting at Paris, Texas.

THE UNITED STATES,
vs.
SAMUEL ROBINSON, C. E. COOK, O. J. COOK, Cyrus Frease, J. B. Chamberlain, John Jackson, J. Lawrence, and 23 others.

Petition for writ of error.

To the honorable the Supreme Court of the United States of America:

Your petitioners, C. E. Cook, O. J. Cook, Cyrus Frease, J. B. Chamberlain, John Jackson, and J. Lawrence, and each of them, severally, for himself, respectfully represent that a final judgment of the circuit court of the United States of America, within and for the eastern district of Texas, within the fifth circuit, sitting at Paris, Texas, was, on the 18th day of July, A. D. 1890, rendered against them, and each of them, in a

114 certain proceeding by indictment found against them by a grand jury of said court, pretending to charge them, and each of them, with having committed the crime of murder on the 25th day of July, A. D. 1888, in that section of the country lying between Kansas and Texas, bounded on the west by New Mexico, and extending east to the 100th meridian longitude, commonly called the "Neutral Strip," or "No Man's Land." That they, and each of them, were found guilty of said charge by the verdict of a jury in said court, and thereupon they, and each of them, were by said court sentenced to be hanged by the neck until they, and each of them, be dead, and that the 19th day of December, A. D. 1890, was set and appointed for the execution of said sentence.

And your petitioners, and each of them, aver that the said circuit court of the eastern district of Texas, at the time the alleged crime is alleged to have been committed, had no jurisdiction to try and punish offenses committed in the said territory or district of No Man's Land or Neutral Strip aforesaid; that the said court did not have, has not now, and never has had the power, authority, or jurisdiction to try and punish this alleged offense; that the jurisdiction assumed and exercised in this cause in rendering the judgment and pronouncing the sentence, as aforesaid, is wholly unwarranted and unauthorized by law.

Your petitioners, and each of them, further aver that the said
115 pretended indictment, upon which they and each of them were tried, does not charge them or either of them with any crime against the United States of America, or with any act in violation of the laws thereof. And your petitioners, and each of them, further aver, that in the record, proceedings, and judgment aforesaid there is other and manifest error apparent in the record, for which a bill of exceptions has been tendered by the defendants, and each of them duly allowed, signed, and made a part of the record, by which said error they, and each of them, are injured, and by which they, and each of them, are aggrieved.

Wherefore your petitioners, and each of them, pray that your honor grant to your petitioners, and each of them, a writ of error, returnable at the next term of the Supreme Court of the United States of America, to the end that such judgment and proceedings may be examined, revised, corrected, and reversed; and as in duty bound will ever pray.

C. E. COOK.
O. J. COOK.
CYRUS FREASE.
JOHN JACKSON.
J. B. CHAMBERLAIN.
J. LAWRENCE.
By ROSSINGTON, SMITH & DALLAS,
HODGES, POLLARD & HODGES, AND
B. E. JOHNSTON,
Their Attorneys.

(Endorsed:) Writ allowed without bond for costs or otherwise, and clerk will issue writ forthwith as herein prayed. Done this 6th day of Sept., 1890. David E. Bryant, judge.

No. 20. The United States v. Sam'l Robinson and others. Petition for writ of error. Filed Sept. 6, 1890. H. H. Kirkpatrick, clerk.

116 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judge of the circuit court of the United States for the eastern district of Texas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, before you, or some of you, between The United States, plaintiff, and C. E. Cook, O. J. Cook, Cyrus Frease, J. B. Chamberlain, John Jackson, and J. Lawrence, defend-

ants, which cause is numbered 20 on the criminal docket of said court, holding sessions at Paris, a manifest error hath happened, to the great damage of the said C. E. Cook, O. J. Cook, Cyrus Frease, J. B. Chamberlain, John Jackson, and J. Lawrence, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 8th day of September, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] H. H. KIRKPATRICK,
Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Paris.

Allowed by —

DAVID E. BRYANT,
U. S. Dist. Judge, E. D. Texas.

117 I, H. H. Kirkpatrick, clerk of the circuit court of the United States for the eastern district of Texas, at Paris, hereby certify that I received this writ on the 8th day of September, 1890, and that on this 18th day of September, 1890, I have transmitted to the clerk of the Supreme Court of the United States a copy of the record and proceedings in the within-named cause, duly certified under my hand and seal.

Witness my hand and the seal of said court at my office in the city of Paris, the day and date last above named.

[SEAL.] H. H. KIRKPATRICK, *Clerk.*

(Indorsed:) The United States *v.* C. E. Cook et al. 20. Writ of error. Filed Sept. 8, 1890. H. H. Kirkpatrick, clerk.

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to Joseph H. Wilson, United States attorney for the eastern district of Texas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, at Paris, wherein C. E. Cook, O. J. Cook, Cyrus Frease, J. B. Chamberlain, John Jackson, and J. Lawrence are plaintiffs in error and The United States is defendant in error, to show cause, if any there be,

why the judgment and sentence rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 11th day of September, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] H. H. KIRKPATRICK,
Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Paris.

119 On this eleventh day of September, in the year of our Lord one thousand eight hundred and ninety, personally appeared before me the subscriber, Raymond Herz, deputy United States marshal for the eastern district of Texas, and makes oath that he delivered a true copy of the within citation to Joseph H. Wilson, United States attorney for the eastern district of Texas, at Paris, in said eastern district of Texas.

RAYMOND HERZ,
Depy. Marsh.

Sworn to and subscribed the eleventh day of September, A. D. 1890.

[SEAL.] H. H. KIRKPATRICK,
Clerk U. S. Circuit Court for the Eastern District of Texas, at Paris.

IN THE

Supreme Court of the United States.

C. E. COOK, O. J. COOK, CYRUS FREASE, J. B. CHAMBERLAIN, JOHN JACKSON, AND J. LAWRENCE,
Plaintiffs in Error,

v.

THE UNITED STATES,
Defendant in Error.

Motion to advance cause for hearing.

JOSEPH FREASE,
WILLIAM R. DAY,
Of Counsel for Plaintiffs in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1890.

IN THE

Supreme Court of the United States.

C. E. COOK, O. J. COOK, CYRUS FREASE, J. B. CHAMBERLAIN, JOHN JACKSON, AND J. LAWRENCE,
PLAINTIFFS IN ERROR,

v.

THE UNITED STATES,
DEFENDANT IN ERROR.

Motion to advance cause for hearing.

Now come the above-named plaintiffs in error and respectfully represent to the court that they are the plaintiffs in error in said cause, the same being number thirteen hundred and eleven on the docket of this Court.

That as appears of record therein, they and each of them are under sentence of death by virtue of the judgment in said cause rendered by the United States Circuit Court for the Eastern District of Texas; that under section six of the Act of February 6, 1889, Revised Statutes of the United States, vol. 25, p. 655, said cause is one entitled to advancement for speedy hearing. Said plaintiffs in error respectfully ask an order advancing said cause for hearing at an early day to be fixed.

Joseph Frease,
William R. Day,
of counsel for pltffs. in error.

IN THE

Supreme Court of the United States.

C. E. COOK, O. J. COOK, CYRUS FREASE, J. B CHAMBERLAIN, JOHN JACKSON, AND J. LAWRENCE,
PLAINTIFFS IN ERROR,

v.

THE UNITED STATES,
DEFENDANT IN ERROR.

Motion to print Record at the expense of the Government.

JOSEPH FREASE,
WILLIAM R. DAY,
Of Counsel for Plaintiffs in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1890.

IN THE

Supreme Court of the United States.

C. E. COOK, O. J. COOK, CYRUS FREASE, J. B. CHAMBERLAIN, JOHN JACKSON, AND J. LAWRENCE,

PLAINTIFFS IN ERROR,

v.

THE UNITED STATES,

DEFENDANT IN ERROR.

Motion to print Record at the expense of the Government.

Now come the above-named plaintiffs in error and respectfully represent to the Court that they are the plaintiffs in error named in cause number thirteen hundred and eleven of the docket of this Court. That, as appears of record therein, they and each of them are under sentence of death, by virtue of the judgment in said cause rendered by the United States Circuit Court of the Eastern District of Texas. That a writ of error has been allowed and is being prosecuted in this Court under an Act of the Con-

gress of the United States, passed February 6, 1889, Revised Statutes of the United States, vol. 25, p. 655. That under said act said plaintiffs in error are entitled to prosecute the said writ without security for the prosecution thereof or for costs. Plaintiffs in error are entitled to an examination of the record and proceedings in said cause under such rules and regulations as this Honorable Court may prescribe. Plaintiffs in error respectfully ask the Court for an order requiring the printing of the record herein at the expense of the Government.

Joseph Frenier,
William R. Day,
of Counsel for Plffs. in error.

IN THE

Supreme Court of the United States.

C. E. COOK, O. J. COOK, CYRUS FREASE, J. B. CHAMBERLAIN, JOHN JACKSON, AND J. LAWRENCE,
PLAINTIFFS IN ERROR,

v.

THE UNITED STATES,
DEFENDANT IN ERROR.

No. 1311.

Brief in support of Motions to Advance and to require Government to print Record.

JOSEPH FREASE,
WILLIAM R. DAY,
Of Counsel for Plaintiffs in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1890.

IN THE

Supreme Court of the United States.

C. E. COOK, O. J. COOK, CYRUS FREASE, J. B. CHAMBERLAIN, JOHN JACKSON, AND J. LAWRENCE,

PLAINTIFFS IN ERROR,

v.

THE UNITED STATES,

DEFENDANT IN ERROR.

Brief in support of motions to advance and to require Government to print Record.

STATEMENT.

C. E. Cook, O. J. Cook, Cyrus Frease, J. B. Chamberlain, John Jackson, and J. Lawrence, the plaintiffs in error, with twenty-four others, were, at the October Term, 1889, of the circuit court of the United States for the Eastern District of Texas, sitting at Paris, Texas, indicted by a grand jury of said court for the crime of the murder of one John M. Cross on the 25th day of July, 1888, in the Neutral Strip, or "No Man's Land," in the Indian Territory. At the April Term, 1890, of said court the case

came on for trial, by jury, as to the plaintiffs in error and six others of those indicted.

The jury found the plaintiffs in error guilty of murder, a mis-trial was returned as to one, and the others tried were acquitted. The plaintiffs in error then moved the court for a new trial and in arrest of judgment upon various grounds. Both motions were overruled, and the plaintiffs in error severally sentenced to be executed on the 19th day of December, 1890. The plaintiffs in error took exceptions to the action of the court in assuming jurisdiction of the case, to various rulings made on the trial in admitting and rejecting testimony, in the charge, in receiving the verdict, in proceeding to try the case prior to the October Term, 1890, in overruling the motions for new trial and in arrest of judgment, in holding the indictment to be good, and in passing sentence upon them, all of which appears in the bill of exceptions duly allowed by the judge of said court at said term.

On September 6, 1890, and within the time allowed, the plaintiffs in error filed in said court a petition to this Honorable Court for the allowance of a writ of error, which was duly allowed on the same day, as provided in Act of Congress of February 8, 1889, U. S. Statutes, vol. 25, pp. 655, 656, sec. 6.

The record and assignments of error having been duly filed in this Court, the plaintiffs in error on Oct. 14, 1890, filed herein two motions, one to advance said cause for hearing, the other to require the Government to print the record at its expense.

Section 6 of the Act of February 8, 1889, above referred to, provides:

"SEC. 6. That hereafter in all cases of conviction of crime, the punishment of which provided by law is death,

tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be re-examined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as the said court may prescribe. Every such writ of error shall be allowed as of right, and without the requirement of any security for the prosecution of the same or for costs. Upon the allowance of every such writ of error, it shall be the duty of the clerk of the court to which the writ of error shall be directed to forthwith transmit to the clerk of the Supreme Court of the United States a certified transcript of the record in such case, and it shall be the duty of the clerk of the Supreme Court of the United States to receive, file, and docket the same. Every such writ of error shall, during its pendency, operate as a stay of proceedings upon the judgment in respect of which it is sued out. Any such writ of error may be filed and docketed in said Supreme Court at any time in a term held prior to the term named in the citation as well as at the term so named; and all such writs of error shall be advanced to a speedy hearing on motion of either party. When any such judgment shall be either reversed or affirmed, the cause shall be remanded to the court from whence it came for further proceedings in accordance with the decision of the Supreme Court, and the court to which such cause is so remanded shall have power to cause such judgment of the Supreme Court to be carried into execution. No such writ of error shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been held during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record."

BRIEF.

We desire to submit some considerations in support of these motions.

The motion to advance, it would seem, is to be granted as a matter of course; the statute provides expressly that such writs shall be advanced to a speedy hearing on the motion of either party. A conviction and sentence of death appearing of record is all the showing required as we understand this provision. The motion to require the Government to print the record should be granted, we submit, from the provisions of the statute and the justice of such a case where persons are convicted of capital offences.

The statute provides that every such writ shall be allowed as of right and without the requirement of any security for the prosecution of the same or for costs.

Rule 10 of this Court makes provision for the security for costs in ordinary cases, and the advancement to the clerk of the cost of printing the record. The sum required for printing is taxed as a part of the costs, and may be recovered by the party required to advance the same in the event the cause is decided favorably to him.

These provisions seem to be a part of a system designed to secure the payment of costs by the parties in the usual practice of the Court.

In capital cases the section quoted provides:

"Every such writ of error shall be allowed as of right and without the requirement of any security for the prosecution of the same *or for costs.*"

If a party, then, can have re-examination of a conviction for an offence punishable by death, as "of right" and without any security for costs, why should he be required to advance the principal part of the costs as a prerequisite to an examination of his cause? If the convicted person can be required to prepay the costs of printing the record, he is then placed in this anomalous position; he is not

required to secure the costs, but is required to advance a major portion of them. Security is dispensed with by the statute, but cash in advance is required. We submit the statute intends to give a re-examination of the record and proceedings to parties convicted of offences punishable by death without burdening them, at least until final judgment, with heavy bills of costs, which, in many cases, might be equivalent to a denial of justice and result in the infliction of the death penalty upon innocent persons improperly and erroneously convicted.

JOSEPH FREASE,
WILLIAM R. DAY,
of Counsel for Plaintiffs in Error.

Supreme Court U. S.
FILED.
DEC 11 1890
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1311.

C. E. Cook, O. J. Cook, Cyrus Frease, J. B. Chamberlain, John Jackson, and J. Lawrence,

PLAINTIFFS IN ERROR,

vs.

The United States.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

JOHN F. DILLON,
WILLIAM R. DAY,
JOSEPH FREASE,
of Counsel.

GEORGE R. PECK,
W. H. ROSSINGTON,
For Plaintiffs in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1890.

Supreme Court of the United States.

OCTOBER TERM, 1890.

C. E. COOK, O. J. COOK, CYRUS FREASE, J. B. CHAMBERLAIN, JOHN JACKSON, AND J. LAWRENCE, PLAINTIFFS IN ERROR,

v.

THE UNITED STATES.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

This is a writ of error to the Circuit Court of the United States for the Eastern District of Texas. Plaintiffs in error were, on the 31st of October, 1889, indicted in that court for the crime of murder, alleged to have been committed on the 25th of July, 1888, "in that section of the country lying between "Kansas and Texas, bounded on the west by New "Mexico, and extending east to the 100th meridian of "longitude, commonly called the 'Neutral Strip,' or "'No Man's Land.'" The indictment avers that the region so described is in the Indian Territory, and

is attached to, and constitutes a part of, the Eastern Judicial District of Texas for judicial purposes. The defendants were tried at the April term of the Circuit Court for the Eastern District of Texas, at Paris, on the 8th day of July, 1890, and the jury returned a verdict finding them guilty of murder as charged in the indictment. Motions for a new trial and in arrest of judgment were duly heard and overruled, and plaintiffs in error were sentenced to death, and the 19th day of December, 1890, fixed for the day of execution.

Many assignments of error appear in the record, but instead of following the order in which they are stated, we will present them in the order which seems to us best calculated to bring them clearly to the attention of the Court.

The Court was Without Jurisdiction.

I.

The "Neutral Strip," or "No Man's Land," lies intermediate between Kansas and Colorado on the north, Texas on the south, the 100th meridian of longitude on the east, and the Territory of New Mexico on the west. The court assuming jurisdiction is the Circuit Court for the Eastern District of Texas, and the inquiry which naturally first presents itself is: How, when, and by what legislation a court so far removed from the *locus* of the offence became endowed with jurisdiction to try it? An attempt to answer this inquiry will bring to the at-

tention of the Court a large mass of curiously interesting historical matter, running back for more than half a century. It will be necessary to trace boundaries, to consult treaties, and to refer to statutes which were passed during the most exciting epoch of our history.

Texas was admitted into the Union by the Joint Resolution of December 29, 1845. (9 Stat. 108.) The long projection in the northwest corner of the State, usually called the "Panhandle," extended to the Arkansas river and included portions of the present States of Kansas and Colorado. This boundary of Texas was founded upon the prior territorial dominion and right of possession of the Republic of Mexico, as acknowledged by the United States by the treaty between that country and this, concluded in January, 1828. (See 8th Stat.-at-Large, Art. 2, page 374.) In 1845, when Texas became a State of the Union, the Missouri Compromise of 1820 was still in force. By that measure, slavery was forever prohibited in all that portion of the Louisiana purchase which lies north of 36 deg. 30 min. north latitude, not included within the limits of the State of Missouri. (See sec. 8, act of March 6th, 1820, 3 Stat., page 548.) Of course the Missouri Compromise, being applicable only to the Louisiana purchase, did not affect Texas; but as Texas came in as a slave State, and the Panhandle extended farther north than 36 deg. 30 min., it appears to have been considered advisable, in the interests of harmony, to bring about such an adjustment of the boundaries of Texas as

should reconcile its domestic institutions with the spirit of the compromise measure of 1820. Accordingly, the joint resolution for annexing Texas provided for the formation of new States within its existing limits; but if the new States were south of 36 deg. 30 min., they were to be admitted with or without slavery, as the people should desire; but if north of the 36 deg. 30 min., slavery was to be prohibited. (5 Stat. page 797.) This was followed in 1850 by the act fixing the boundaries of the State of Texas, and providing for the cession by Texas to the United States of all territory exterior to her boundaries as fixed in the act, and for the organization of the Territory of New Mexico. (9 Stat. 446.) By this act, the northern boundary of Texas was fixed at 36 deg. 30 min., thus conforming to the Missouri Compromise line; and Congress agreed to pay for the cession ten millions of dollars, in stock earning five per cent. interest. Texas accepted the proposition of the United States, and by appropriate legislation made the cession. (See Oldham & White's Digest Laws of Texas, page 55.) By this sale and purchase the northern end of the Panhandle was cut off at 36 deg. 30 min., and the United States became vested with title and jurisdiction thereto. In addition to the proposition made by Congress for the purchase of the northern end of the Panhandle, the Territory of New Mexico was by the same act erected, with its eastern boundary the 103d meridian. (9 Stats. page 447, sec. 2.)

The next step in tracing the history of No Man's

Land is the act organizing the Territories of Nebraska and Kansas. (10 Stat. 277.) By this act the southern boundary of Kansas was fixed at the 37th parallel of latitude. The northern boundary of Texas having been fixed 36 deg. 30 min , and the southern boundary of Kansas being 37 deg., a narrow space half a degree in width was left unapportioned and unassigned between them. This narrow strip is No Man's Land. Afterwards the Territory of Colorado was erected cutting off Kansas at the 102d meridian, and taking in the portion of her territory west thereof (12 Stats. 172). It thus appears that all the land acquired by the United States by purchase from the State of Texas has been allotted in part to the State of Kansas, in part to the Territory of New Mexico, and subsequently to the Territory and State of Colorado, save and except this small fragment three degrees long and half a degree wide. It has been successively a part of the Viceroyalty of New Spain, a part of the Republic of Mexico, a part of the Republic of Texas, a part of the State of Texas, and, finally, No Man's Land.

II.

We now reach the consideration of the question: What was the legal status of this region called No Man's Land in the long period of time from its cession to us by the State of Texas to the enactment of recent statutes which will hereafter be mentioned?

By the cession from Texas, beyond any question the United States obtained full, complete, and absolute

title over it—all the title which the State of Texas had, or could cede to the United States. The title of Texas to every foot of land within her territorial dominions has always been asserted by that State and recognized by the United States. The joint resolution of the Congress of the United States, providing for the admission of Texas into the Union, contained this emphatic guaranty of the rights of Texas in this respect: "The said State, when ad- "mitted into the Union, * * * shall also retain "all the vacant and unappropriated lands lying "within its limits, to be applied to the payment of "the debts and liabilities of said Republic of Texas, "and the residue of said lands, after the discharge "of said debts and liabilities, to be disposed of as "said State may direct." (5 Stat. 797.) By the cession, then, the United States took the tract of land in question free from any claims or interests of any kind, unembarrassed by Indian titles or by any claim or assertion whatever of ownership or jurisdiction. Right, title, possession, and dominion, all became centred in the United States. Its investiture in this respect was no less complete than it is to one of its dock-yards or arsenals. From that time it was within the discretion of the United States to make such laws, or to omit to make them, with respect to its government, as it might in its wisdom determine. It is not necessary to inquire why for so many years Congress put no law upon the statute books relating to this region, so expressively called No Man's Land. Whether this omission was from forgetfulness, or in pursuance of a

settled policy, is immaterial in determining its legal status. Whatever may have been the reason, it remained unaffected by any law which indicated a design to take it out of its anomalous position. No court claimed jurisdiction over it; no process ran into it. Settled communities grew up contiguous to it, but, notwithstanding its lands were public within the common meaning of the term, no land office was established, no proclamation opening it to settlement was issued, and no civil government was instituted within its limits. On the maps it was sometimes designated as "No Man's Land, sometimes as the "Neutral Strip," and sometimes as the "Public Land Strip."

In course of time a few squatters of more or less nomadic habits moved into it and made it their habitation. Such property as they brought with them on to this strip, or accumulated there after their arrival, they protected by force, and dealt out to those who committed wrongs upon persons or property a rude and summary justice. Although thus freely and openly invaded, and portions of it fenced into pastures and ranches, no objection was interposed by the Government, nor any effort made by any of its officers, civil or military, to expel the invaders. It was a country under the sole and exclusive jurisdiction of the United States, and subject to the laws of the United States, but without that necessary relation to a fixed jurisdiction which enables laws to be enforced, and penalties visited upon offenders. Whether, during the time this re-

gion remained in the condition above described, offences committed within it were not somewhere and somehow cognizable and punishable, is apart from the question involved in this case. The Eastern District of Texas does not claim jurisdiction by reason of any *general* authority in the courts of the United States over No Man's Land, nor because it is the district in which the defendants were found, or into which they were first brought, as provided by section 730 of the Revised Statutes. Jurisdiction is claimed by virtue of certain statutes, to which it is now our duty to draw attention. It need hardly be said that the jurisdiction of that court cannot spring up spontaneously from the lack of jurisdiction of some other court.

III.

The Eastern District of Texas was originally established in 1857 (11 Stat. 164). In 1879 the Northern District of Texas was established (20 Stat. 318). Some unimportant changes in the boundaries of the three districts comprised in the State of Texas have been made, but their names substantially indicate their territorial location, the Eastern District extending along the eastern border of the State from the Indian Territory on the north to the Gulf of Mexico on the south. We shall undertake to show that the region called No Man's Land is not and never has been in the jurisdiction of the Eastern District of Texas. And to do so we invite the attention of the Court to the statutes upon which the

prosecution relied in asserting the jurisdiction of the Texas court.

First, the act of January 6th, 1883 (22 Stat. 400). The contention of the Government is that by this statute No Man's Land was annexed to the Northern District of Texas, and, by a subsequent statute, transferred from the Northern to the Eastern District, thus giving the Eastern District jurisdiction. It is necessary, first, therefore, to inquire if it was attached to the Northern District of Texas by the act of 1883. This act, in its first section, provides for holding a term of the district court for the District of Kansas at Wichita, on the first Monday of September of each year. Section 2 apportions a certain part of the Indian Territory to the District of Kansas. Section 3 apportions the remainder of the Indian Territory not set apart for the five civilized tribes, to the Northern District of Texas.

As the act is short and of importance at this stage of the discussion, we quote it in full:

"AN ACT to provide for holding a term of the Dis-
" trict Court of the United States at Wichita, Kan-
" sas, and for other purposes.
" *Be it enacted by the Senate and House of Repre-*
" *sentatives of the United States of America in Con-*
" *gress assembled*, That there shall be one term of
" the United States District Court for the District of
" Kansas, held at Wichita, in each year, on the first
" Monday of September, from and after the passage
" of this act, but no cause, action, or proceeding shall
" be tried or considered in the court herein provided
" for unless by consent of all the parties thereto or

" order of the court except as otherwise hereinafter
" provided. The clerk, marshal, and district attor-
" ney for said district of Kansas shall perform the
" duties pertaining to their offices, respectively, for
" said court, and the clerk and marshal shall appoint
" a deputy, to reside and keep their offices at Wichita,
" who, in the absence of the principals, shall do and
" perform all the duties appertaining to their said
" offices respectively. But the city or county author-
" ities shall provide a suitable building without ex-
" pense to the United States in which to hold said
" court.

"SEC. 2. That all that part of the Indian Territory
" lying north of the Canadian river and east of Texas
" and the one hundredth meridian not set apart and
" occupied by the Cherokee, Creek, and Seminole
" Indian tribes shall, from and after the passage of
" this act, be annexed to and constitute a part of the
" United States judicial district of Kansas; and the
" United States district courts at Wichita and Fort
" Scott in the District of Kansas, shall have exclusive,
" original jurisdiction of all offences committed within
" the limits of the territory hereby annexed to said
" district of Kansas against any of the laws of the
" United States now, or that may hereafter be, oper-
" ative therein.

"SEC. 3. That all that portion of the Indian Ter-
" ritory not annexed to the district of Kansas by
" this act, and not set apart and occupied by the
" Cherokee, Creek, Choctaw, Chickasaw, and Semi-
" nole Indian tribes shall, from and after the passage
" of this act, be annexed to and constitute a part of
" the United States judicial district known as the
" northern district of Texas; and the United States
" District Court at Graham in said northern district
" of Texas shall have exclusive original jurisdiction

"of all offences committed within the limits of the "territory hereby annexed to said northern district "of Texas, against any of the laws of the United "States now, or that may hereafter be, operative "therein.

"SEC. 4. That nothing contained in this act shall "be construed to affect in any manner any action or "proceeding now pending in the circuit or district "court for the western district of Arkansas, nor the "execution of any process relating thereto; nor "shall anything in this act be construed to give to "said district courts of Kansas and Texas, respec- "tively, any greater jurisdiction in that part of said "Indian Territory so as aforesaid annexed, respec- "tively, to said district of Kansas, and said northern "district of Texas than might heretofore have been "lawfully exercised therein by the western district "of Arkansas; nor shall anything in this act con- "tained be construed to violate or impair, in any "respect, any treaty provision whatever."

Approved January 6, 1883.

As the territory thus apportioned is described as "The Indian Territory," the question whether No Man's Land is within the scope of the act depends upon the question whether No Man's Land was a part of the Indian Territory. It was not Indian country or Indian territory unless there rested upon it the Indian title. As was said by Mr. Justice Brewer, at the Circuit, *In re Jackson* (40 Fed. Rep. 372):

"Now the expressions 'Indian Territory' and 'In- "dian Country' are used interchangeably in the

"statutes. We speak of the 'Indian Territory;' "but politically that is a mistake. There is no "organization. It is more properly a territory, re- "ferring simply to geographical extension, and not "to any political organization."

What *was* the Indian Territory? It was not a Territory in the political sense of the term. It was a region of country inhabited by Indians by virtue of treaties or executive orders. It included widely-separated parcels of land, varying in extent from a few thousand acres to great tracts almost large enough for a State. The purpose of the Government in originally designating and defining the Indian country was solely to regulate and control the intercourse between citizens and the various Indian tribes In order to separate the Indians and place them in a condition of tutelage and control, it was essential that a country dedicated to their use and occupation should be set apart and defined. Wherever such country was thus set apart—there was Indian country.

The act of 1834 relating to trade and intercourse with the Indians contains a definition of the Indian Country which makes this plain: "That all that part "of the United States west of the Mississippi and not "within the States of Missouri and Louisiana or the "Territory of Arkansas; and also that part of the "United States east of the Mississippi and not within "any State, *to which the Indian title has not been* "*extinguished*, for the purposes of this act be taken "and deemed Indian country." (4 Stat. 729.) "In- "dian Territory" and "Indian country" were orig-

inally convertible terms, and both had reference exclusively to lands occupied by Indians, or to which the Indian title had not been extinguished. This original meaning still clings to the words in our legislation. In that chapter of the Revised Statutes providing for the government of the Indian country, the revisors frequently substitute the one term for the other; as for instance, in sec. 2138, where the term "Indian "country" is substituted for "Indian Territory," as it appeared in the original statute; and in the second and third lines of sec. 2148, the same substitution is made. So, also, in the act of March 1, 1889, which, as will presently appear, is the very act relied upon by the prosecution as giving jurisdiction to the Texas court to try these defendants, the words "Indian "Territory" and "Indian country" are used interchangeably. Sec. 22 provides a punishment for disturbing meetings for religious worship in the Indian *Territory*. Sec. 23 provides punishment for assault with intent to rob in the Indian *country*. Sec. 24 provides punishment for injury to animal property in the Indian *Territory*. Sec. 25 provides punishment for assault in the Indian *country*.

Both these terms have a meaning, but it is generally the same meaning; and what that meaning is, this Court has most clearly and emphatically stated. The Indian country is simply that portion of the territory of the United States to which the Indian title has not been extinguished. Many words cannot add to the force of this definition. Originally used in the statute of 1802, and then in the statute of 1834, and

from that time constantly employed in statutes governing intercourse with the Indians, the term "Indian country" has become almost a formula in our Indian legislation; and this is what it means:

"The simple criterion is, that as to all of the lands "thus described it was Indian country wherever the "Indian title had not been extinguished, and it continued to be Indian country so long as the Indians "had title to it, and no longer. As soon as they "parted with the title, it ceased to be Indian country, "without any further act of Congress, unless by "the treaty by which the Indians parted with their "title, or by some act of Congress, a different rule "was made applicable to the case."

And again:

"It follows from this that all the country de"scribed by the act of 1834 as Indian country, re"mains Indian country so long as the Indians retain "their right and title to the same, and ceases to be "Indian country whenever they lose that title, in "the absence of any different provision by treaty or "by act of Congress."

The above language is from the opinion delivered by the lamented Mr. Justice Miller, speaking for this Court in *Bates* v. *Clark* (95 U. S. 204). Later, in *Ex parte Crow Dog* (109 U. S. 556), this Court, by Mr. Justice Matthews, reasserted the doctrine of *Bates* v. *Clark*, in this language:

"In our opinion that definition now applies to all

"the country to which the Indian title has not been "extinguished within the limits of the United "States."

Always there is a test to determine whether any given region is a part of the Indian country, and that test is: Has the Indian title been extinguished? If it has, then it does not fall within the term Indian country or Indian territory.

Let us now apply the test which this Court has given us to the question whether No Man's Land was a part of the Indian Territory or Indian country. Was the Indian title extinguished in 1883, when the first statute which is claimed confers Federal jurisdiction over it was passed? This question answers itself. *There had never been any Indian title to extinguish.* Not by any possibility of reasoning can No Man's Land be considered Indian Territory or Indian country. It came to us, as already shown, from Texas by purchase. It came to us clothed with immunity from any claim or title whatever. It was ours. No Indian or Indian tribe, so far as history records, had ever laid any claim to it before we acquired it, and most assuredly no one has ever made claim to it since. From the time we purchased it to the day it was opened to settlement, during the present year, it was public lands.

But the act of 1883, which we have cited at length, speaks of "The Indian Territory;" implying that it was a known and fixed region, and not merely Indian country in a general sense. And this will bring

us presently to an examination of the question: What region of country was specifically known as "The Indian Territory?" and it will be found that, while its boundaries have never been established by law, yet it was known and designated by the name The Indian Territory, not only by popular use, but in statutes, legal documents, and executive acts.

Now the act of 1883, by its terms, is only a reapportionment of jurisdiction which had formerly been exercised by the United States Courts of the Western District of Arkansas. Section 4 of the act explicitly declares: "Nor shall anything in this act be "construed to give the said district courts of Kansas "and Texas, respectively, any greater jurisdiction in "that part of said Indian Territory, so, as aforesaid, "annexed respectively to said district of Kansas and "said Northern District of Texas, *than might heretofore have been lawfully exercised therein by the Western District of Arkansas.*" It follows, therefore, that unless "No Man's Land" was, at the passage of the act of 1883, within the jurisdiction of the Western District of Arkansas, the act did not operate upon it at all.

We must, then, inquire what was the limit of the jurisdiction of the United States courts for the Western District of Arkansas. This examination will show beyond any question that the last-mentioned court never had, nor claimed to have, any jurisdiction over "No Man's Land."

The jurisdiction of the Western District of Arkansas over the Indian country was provided for by

the act of March 3, 1851 (9 Stat. 594). This act, however, only followed the previous act giving jurisdiction to the district of Arkansas when that State constituted only one judicial district (5 Stat. 680). And that in turn followed a prior statute giving jurisdiction to the United States court for the Territory of Arkansas (4 Stat. 729). This statute is the one already adverted to as defining the term "Indian country." It is entitled "An Act to regu- "late trade and intercourse with the Indians, and to "preserve peace on the frontiers." The first section we have already quoted (*supra*, page 12). The section giving jurisdiction to the Arkansas court is as follows:

"SECTION 24. *And be it further enacted*, That, for "the sole purpose of carrying this act into effect, "all that part of the Indian country west of the "Mississippi river that is bounded north by the "north line of lands assigned to the Osage tribe of "Indians, produced east to the State of Missouri; "west by the *Mexican possessions*; south by Red "River and east by the west line of the Territory "of Arkansas and the State of Missouri, shall be, "and hereby is, annexed to the Territory of Arkan- "sas; and that for the purpose aforesaid, the residue "of the Indian country west of the said Mississippi "river shall be, and hereby is, annexed to the Ju- "dicial District of Missouri; and for the purpose "aforesaid the several portions of the Indian coun- "try east of the said Mississippi river shall be sev- "erally annexed to the territory in which they are "situate."

Under the authority of this statute, the Arkansas Federal Court, from 1834, exercised jurisdiction over the Indian country, and that jurisdiction was never extended or attempted to be extended west of the one hundredth meridian. No prosecution was ever instituted in that court for any offence committed in No Man's Land. No writ ever ran from it into No Man's Land. The records of the court are as free from any proceeding in No Man's Land as are the records of the Federal courts of Massachusetts or New York.

The one hundredth meridian, when the act of 1834 was passed, was the boundary line between our country and the Mexican possessions. By force of the statute it was the western limit of the Indian country which was attached to the district of Arkansas. When we acquired from Texas the region beyond the one hundredth meridian, it came to us as already shown, not as Indian country but as a region over which there neither was nor had been any Indian title; and from the time we acquired it to the present day it has simply been a mass of public lands.

When the Revised Statutes were adopted in 1874, all prior statutes were revised and consolidated, and those relating to the district courts of Arkansas were embraced in section 533, as follows:

"SEC. 533. The State of Arkansas is divided into "two districts, which shall be called the eastern and "western districts of Arkansas. The western dis-

" trict includes the counties of Benton, Washington,
" Crawford, Scott, Polk, Franklin, Johnson, Madi-
" son, Carroll, Sevier, Sebastian, Phillips, Crittenden,
" Mississippi, Craighead, Greene, Randolph, Law-
" rence, Sharp, Poinsett, Cross, Saint Francis, Monroe,
" Woodruff, Jackson, Independence, Izard, Marion,
" Fulton, and Boone, and the country lying west of
" Missouri and Arkansas, KNOWN as the 'Indian Ter-
" ritory.' The eastern district includes the residue
" of said State."

In this section, the Indian country attached to the western district of Arkansas is described as "the " country lying west of Missouri and Arkansas *known* " as the Indian Territory." Here, as in the act of 1883, there is an assumption by Congress that a certain region had come to be known by a certain name. It is assumed that that region was so well known by that name that the jurisdiction of a court might be fixed by it. Whatever was the country lying west of Missouri and Arkansas *known* as the Indian Territory, was the country over which the Arkansas court might exercise jurisdiction, and it was that country which Congress, by the act of 1883, reapportioned, giving a part of it to Kansas and a part of it to the Northern District of Texas.

The region known as the Indian Territory did not include No Man's Land.

The first reason that naturally suggests itself why the region known as the Indian Territory should extend only to the one hundredth meridian is, that only

to that meridian was the region *in fact* Indian country or territory. The same common understanding that designated the region east of the one hundredth meridian as the Indian Territory, designated that west of it as No Man's Land, or the Neutral Strip. On the maps, No Man's Land was designated "Public lands," and, as we have already shown, they were, in fact, public lands.

In 1872, two years before the adoption of the Revised Statutes, the Hon. Francis A. Walker, then Commissioner of Indian Affairs, made a very elaborate report in which he defined the Indian Territory as follows:

> "An extensive district, bounded north by Kansas, "east by Missouri and Arkansas, south by Texas, "and *west by the one hundredth meridian.*"
>
> Report of Commissioner General Land Office for 1872, page 33.

This was the designation of the officer specially charged with the administration of Indian affairs.

A year later, on the 17th day of September, 1873, the Commissioner of Public Lands described the Indian Territory as follows:

> "Beginning at the intersection of the thirty-seventh "degree of north latitude (south boundary of Kan "sas) with the west boundary of the State of Mis- "souri, thence with said west boundary of Missouri "to the northwest corner of the State of Arkan- "sas, thence with the west boundary of Arkansas "to its intersection with the Red River (north "boundary of Texas), thence up said Red River to

"*the one hundredth degree of longitude* west from "Greenwich, thence north *with said one hundredth* "*degree of longitude* to its intersection with the "thirty-seventh degree of north latitude, thence east "on said thirty-seventh degree of latitude to the "place of beginning.

"*Note.*—The Indian Territory being as yet unor- "ganized there is no special statute defining its boun- "daries."

(Letter of Commissioner of General Land Office to Thomas J. Durant, dated September 17, 1873. Records Commissioner General Land Office, volume 27, page 304.)

Thus it will be seen that the Commissioner of Indian Affairs and the Commissioner of the General Land Office express the same understanding of the boundaries of the region *known* as the Indian Territory, one two years and the other one year prior to the adoption of the Revised Statutes.

By the acts of March 3, 1879, and June 16, 1880, a Public Land Commission was created for the codification of the laws relating to the survey and disposition of the public domain. In their report they define the Public land strip, as follows:

"The public land strip of unoccupied public land "*west of Indian Territory* and south of Kansas is a "part of the territory ceded to the United States by "the State of Texas in 1850. The area of the pub- "lic land strip is estimated at 10,800 square miles, "equal to 6,912,000 acres. *It is not attached to any* "*judicial district.*"

Report of Public Land Commission, page 462.

By the act of March 3, 1881 (21 Stat. 451), a provision was made for the survey of No Man's Land in the following language:

"For running connection lines, guide meridians, "and township lines in the strip of public lands lying "north of the State of Texas and bounded on the "north by the States of Colorado and Kansas, to be "done under the direction of the Commissioner of "the General Land Office, $18,000.00."

Pursuant to this act, the survey was made, and in 1884, a year after the act of 1883, the Commissioner of the General Land Office, in his annual report, said:

"Exterior survey of the public land strip *west of* "*the Indian Territory* has been made, and the dis- "trict is rapidly filling up with settlers and stock- "men, between whom conflicts have occurred for the "possession of the country."

In determining what region was "known" as the Indian Territory, these opinions of the officers of the Government specially charged with the administration of laws relating both to Indian matters and to public land matters, are of controlling weight. They were the officers familiar with these subjects—the officers daily called upon to deal with them.

The understanding that the one hundredth meridian was the western boundary of the Indian Territory continued after the act of 1883. Nor was that act deemed by any department of the Government

as working a transformation of No Man's Land into Indian country, or as making it a part of the Indian Territory.

On the 2d of July, 1884, the Committee on the Judiciary of the House of Representatives of the 48th Congress submitted a report (Report No. 2030) as follows:

"That the unorganized territory south of the "States of Kansas and Colorado and *between the* "*Indian Territory* and New Mexico is not at present "attached to any judicial district. It therefore "affords a harbor for fugitives from justice and "headquarters for lawless persons, and no court "has jurisdiction over the same. It should be at- "tached to some judicial district, and that of Kan- "sas is as convenient as any."

On the 11th of February, 1886, the Committee on the Judiciary of the House of Representatives of the 49th Congress submitted a report embodied in document No. 389, in which the following language was used:

"That the unorganized territory south of the States "of Kansas and Colorado, and *between the Indian* "*Territory* and New Mexico, IS NOT AT PRESENT AT- "TACHED TO ANY JUDICIAL DISTRICT. A quite consid- "erable population reside in this district, and it is "infested with fugitives from justice, and is a safe "harbor for lawless persons. The exterior lines of "the townships have been surveyed, but not the sub- "divisional lines. In view of the fact that this coun "try may be early opened to entry, an amendment "has been suggested to the bill by the Commissioner

"of the Public Land Office, which has been added "to the bill as a proviso, and your committee recom- "mend the passage of the bill as amended."

Annexed to the report of the judiciary committee is a letter from the Commissioner of the General Land Office, bearing date January 29th, 1886, in which it is stated:

"The tract is 167 miles in length by 34½ in width, "and contains an area of 3,687,360 acres, sufficient "for 23,000 farms of 160 acres each. It is my gen- "eral information that the lands are well watered, "productive, and valuable, that the entire tract is "illegally occupied by cattle companies who are re- "ported to have fenced in the whole of the Territory, "and persons who have attempted to make settlement "thereon have complained that they have been pre- "vented from doing so, and in some instances have "alleged that their improvements have been de- "stroyed by the employés of such companies. NOT "BEING ATTACHED TO ANY STATE OR TERRITORY FOR "JUDICIAL PURPOSES, such inhabitants or occupants "as may be there are without the protection or the "restraint of the laws."

Still later, in 1887, four years after the act of 1883, the Committee on Territories of the House of Representatives, having in charge the bill for the organization of the Territory of Oklahoma, in report No. 1684, used this language:

"The first section of the bill organizes the Terri- "tory to be known as Oklahoma, and it comprises "all that part of the United States *known as the*

" *Indian Territory* and the Public Land Strip *west* " *thereof* and north of the Panhandle of Texas."

And again, in 1888, five years after the act of 1883, the Committee on Territories, in report No. 2857, used this language:

"The first section of the bill provides for the " organization of a Territory to be known as Okla- " homa, to be composed of all that part of the In- " dian Territory west of the lands occupied by the " five civilized tribes, and also what is known as the " Public Land Strip, lying north of Texas, east of " New Mexico, south of Colorado and Kansas, and " *west of the Indian Territory.*"

Again, on the 7th of February, 1888, the Committee on Territories of the House of Representatives submitted a report (No. 263) containing the following language:

"The first section of the bill provides for the " organization of a territory to be known as Okla- " homa, to be composed of all that part of the Indian " Territory west of the lands occupied by the five " civilized tribes, and also what is known as the " Public Land Strip lying north of Texas, east of " New Mexico, south of Colorado and Kansas, and " *west of the Indian Territory.*"

As further showing the understanding of the different branches of the Government that No Man's Land was not a part of the region known as the Indian Territory, and, therefore, not covered by the act of 1883, we quote a letter addressed by the Secretary

of the Treasury, May 1st, 1888, to the Speaker of the House of Representatives, calling for legislation which would enable the Treasury Department to enforce the revenue laws in No Man's Land:

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *May* 1, 1888.

SIR: I have the honor to transmit herewith copies of correspondence showing the urgent need of legislation to enforce the internal revenue and other laws of the United States in the public land strip known as "No Man's Land." The territory included in this strip has been attached to the internal-revenue collection district of Kansas, and section 3448 of the Revised Statutes provides that—

"The internal-revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars shall be held to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same be in a collection district or not."

But the land referred to is not embraced in any judicial district, and not being within the jurisdiction of any United States court, the laws of the United States are inoperative, or at least cannot be enforced therein. It will be seen that liquor dealers and distillers openly set the laws at defiance, and the collector of internal revenue for the district of Kansas reports that he has reliable information of the existence of four illicit distilleries in that strip of land, the product of which is openly sold there and smuggled into Kansas.

To the end that the revenue laws may be properly enforced in this territory, I respectfully recommend

the early passage of the needful legislation on the subject.

Respectfully yours,

C. S. FAIRCHILD,

Secretary.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

Prior to the letter above quoted of the Secretary of the Treasury, the Attorney-General on the 15th of November, 1887, had advised the President that No Man's Land was not covered by the act of 1883, because it was not a part of the Indian Territory. We quote from his letter:

DEPARTMENT OF JUSTICE,
WASHINGTON D. C., *Nov.* 15, 1887.

The PRESIDENT.

SIR: I received your note of the 4th instant relating to the administration of the criminal law in that part of the public domain commonly called "*No Man's Land.*" The land so designated is bounded on the north by the States of Kansas and Colorado; *on the east by the Indian Territory;* on the south by Texas, and on the west by New Mexico. Its breadth north and south is about thirty-five miles. Its length east and west is about one hundred and sixty-five miles. The title to it became vested in the United States by cession from the State of Texas, in accordance with the provisions of the act of Congress of the 9th day of September, 1850 (9 U. S. Stats. 446). By the same act a territorial government is provided for the territory of New Mexico. By the act of the 30th of May, 1854 (10 U. S. Stats. 277), the Territory of Kansas was organized. By an act of the 28th of February, 1861 (12 U. S. Stats. 172),

a territorial government was provided for Colorado. In the organization of these three territories, the land referred to was excluded from their several boundaries.

In the establishment of the Courts of the United States for the States of Texas, Kansas, and Colorado, and the Territory of New Mexico, the State and territorial lines limit the judicial districts, except that the United States District Court for Kansas and for the Northern District of Texas, by the 2d and 3d sections of the act of the 6th of January, 1883 (22 U. S. Stats. 400) are extended over portions of the Indian Territory. The land referred to, then *is not embraced in any district established by law of the United States.* * * *

I am very respectfully,

(Signed) A. H. GARLAND,
Attorney-General.

These expressions of different officers of the Government, while, of course, not controlling upon the Judicial Department in matters of law, are, we submit, practically conclusive on the question of fact that the region known as the Indian Territory terminated at the one hundredth meridian, and they show that the different departments of the Government did not regard the act of 1883 as making any change in the status of the neutral strip.

Nothing can be more certain than that the region known as the Indian Territory had for its western boundary the one hundredth meridian. The Revised Statutes, in fixing the jurisdiction of the Western District of Arkansas, described the outer territory attached to the district as "the country lying west

" of Missouri and Arkansas, known as the Indian " Territory," and the act of 1883 was limited to the country over which the Western District of Arkansas had jurisdiction. Therefore the act of 1883 could by no possibility operate upon No Man's Land, which was never any part of the country known as the Indian Territory.

Here we feel it incumbent upon us to refer to the decision of His Honor Mr. Justice Brewer, in *In re Jackson* (40 Fed. Rep. 372), which was an application for a writ of *habeas corpus* by the defendants here prosecuting this writ of error. The opinion upon the application distinctly expressed the grave doubts which Mr. Justice Brewer felt in passing upon it, but remanded the prisoners, assuming the possible existence of jurisdiction in the Texas court. Our investigations of the questions involved have convinced us that a fuller and more careful presentation of the case upon that application would have caused Judge Brewer to have reached a different conclusion. Our long and intimate relationship with that learned jurist, and our knowledge of his perfect freedom from intellectual bias in favor of his own opinions, relieve us from any embarrassment in thus frankly pointing out the error into which he was unconsciously led.

The attention of the court was not directed to the limitation in the fourth section of the act, which forbids the exercise of any greater jurisdiction in the Kansas and Texas courts than could theretofore

have been lawfully exercised by the Western District of Arkansas.

In the opinion in *In re Jackson* attention is called to the following language of the act of 1883, "that "part of the Indian Territory east of Texas and the "100th meridian," as implying that there was some portion of the Territory *west* of the one or the other of these two that was subject to the operations of this act. But we do not think this implication can fairly be raised from the language. On the contrary, it seems quite evident that the boundary line of Texas and the 100th meridian was named the more plainly to show that the country to be affected by the act was only that country which was subject to the jurisdiction of the Arkansas court. No other view is in harmony with section 4 of the act, which forbids the idea that any territory could be included in the act which was not included in the jurisdiction of the Arkansas court. By the act of 1883 only such boundaries were mentioned as had already been fixed and established by prior legislation, and which had been steadily recognized and acted upon by the Federal courts of the western district of Arkansas, in the administration of the laws of the United States.

We conclude, therefore, that the act of 1883 could not possibly include No Man's Land:

1st. Because No Man's Land was not and never had been Indian country, Indian territory, or *The* Indian Territory.

2d. Because it was not and never had been within the jurisdiction of the Federal courts of Arkansas.

Both of these conditions are necessary before No Man's Land can be held to be included within the act of 1883.

The Act of March 1st, 1889.

The jurisdiction asserted by the United States circuit court for the eastern district of Texas over this case is based upon the act of March 1st, 1889, which is entitled "An act to establish a United States "court in the Indian Territory, and for other pur- "poses" (25 Stats. 783).

The first and most obvious purpose of this act is to deal with the Indian Territory and with the Indians in their relation to the Government, and to white citizens of the United States.

As we have before pointed out, the terms "Indian "country" and "Indian Territory" are frequently used interchangeably in this act of 1889 (sections 22, 23, 24, and 25).

By section 17 of the act, it is provided that the Chickasaw Nation and a portion of the Choctaw Nation, together with "all that portion of the Indian "Territory not annexed to the district of Kansas "by the act approved January 26th, 1883, and not "set apart and occupied by the five civilized tribes, "shall, from and after the passage of the act, be "annexed to and constitute a part of the eastern "judicial district of the State of Texas for judicial "purposes." The contention of the Government is,

that by this act No Man's Land is annexed for judicial purposes to the eastern judicial district of Texas.

The first thought that naturally suggests itself, in an examination of this claim of the Government, is the unreasonableness, bordering on absurdity, that Congress should take up a tract of country located as No Man's Land is, and attach it to a district hundreds of miles to the southeast, with intervening judicial districts between. We do not now say that Congress *could* not do this, but we do say that it is most unlikely that it *would* do so unreasonable and so unjust a thing. Immediately joining No Man's Land on the north is the district of Kansas, and also the district of Colorado; adjoining it on the west is New Mexico; on the south is the northern district of Texas; and on the east the Cherokee country attached to Kansas for judicial purposes. It seems incredible that Congress should have deliberately ignored the proximity of these judicial districts, and attached No Man's Land to a district so remote, and by reason of its remoteness so inaccessible as the eastern district of Texas. No officer bearing a writ from the court at Paris can reach No Man's Land without crossing another judicial district; and no prisoner can be brought from No Man's Land to Paris without in like manner traversing a foreign judicial district. No such apportionment of jurisdiction exists or has ever existed in the United States, and this act of 1889, if it accomplishes what is claimed for it, stands alone. Courts are forbidden

to impute improper motives to the legislative branch of the Government, but the construction given to the act of 1889 by the Government is impossible, without casting upon Congress the imputation of an inexcusable lack of both wisdom and justice. Nothing short of imperative words can justify the conclusion that Congress had such intention.

How potent these considerations are in construing the act, is illustrated by the language of His Honor Judge Brewer, in *United States* v. *Soule*, 30 Fed. Rep. 918. The question before him was the act of 1883, and he decided that the Cherokee outlet (which lies east of "No Man's Land," in the Indian Territory), belonged to the district of Kansas. After referring to sections two and three of the act of 1883, he says:

"It will be seen from these two sections, taken in "conjunction with the prior statutes vesting jurisdic- "tion over the entire territory in the district court of "the western district of Arkansas, that the intent of "Congress was to apportion the territory between "the three courts; and we should naturally expect, "in the absence of cogent reasons for the contrary, "that the entire portion of the territory contiguous "to the place of holding court in each district, re- "spectively, would be assigned to that district. It "is unquestionable that the entire southwestern por- "tion goes to the Texas district court, and the entire "eastern portion to the Arkansas court, and, there- "fore, the entire northwestern portion we should "expect to find assigned to the Kansas court. The "intent of the lawmaker, of course, controls in the "interpretation of a statute; and the geographical

"argument as to that intent is in this case most "potent. The convenience and economy of business "require that the territory subject to the jurisdiction "of a court should be as near as possible to the place "where the court is held." * * *

The geographical argument so forcibly alluded to by Judge Brewer is far more potent in this case than in the one in which the language was used.

No Man's Land, as an examination of the map will show, is hundreds of miles distant from the eastern district of Texas, separated by other jurisdictions, and adjacent to the district courts of Kansas, Colorado, New Mexico, and Northern Texas.

In the language of the Soule case, "It is unques- "tionable that the entire southwestern portion goes "to the Texas district court, and the entire eastern "portion to the Arkansas court, and, therefore, the "entire northwestern portion we should expect to "find assigned to the Kansas court." Now, No Man's Land unquestionably is not in the southwestern portion of the Territory. Grant it to be a part of the Indian Territory, it is in the extreme northwest. If by the act of 1883 it was assigned to the Northern District of Texas, as claimed by the Government, what possible reason can be urged for detaching it by the act of 1889 from a district contiguous to it and annexing it to a district separated by hundreds of miles, and by intervening jurisdictions? Nor can it be argued that unless No Man's Land is within the words of the statute that there will be nothing for the statute to operate upon, for the

region south of the Canadian river adjoins the Chickasaw Nation, which, by the act of 1889, is annexed to the Eastern District of Texas, and thus a compact and solid body of territory is operated upon by the statute.

BOUNDARIES AS DEFINED IN THE ACT OF 1889.—We have shown that nothing but imperative words can justify the construction that Congress intended to attach No Man's Land for judicial purposes to the eastern district of Texas. We now invite the attention of the Court to the consideration of the language used, when it will be found clearly enough that there is much more reason for contending that No Man's Land was not within the intention of Congress, than for maintaining the contrary. The first section of the act establishes a United States court, and fixes its jurisdiction. The language fixing the boundaries is, "north by the State of Kansas, east " by the States of Missouri and Arkansas, south by the " State of Texas, and west by the State of Texas and " the Territory of New Mexico." Now, No Man's Land is not bounded north by the State of Kansas, but by the States of Kansas and *Colorado*. The Indian Territory is bounded north by the State of *Kansas*, but one-third of No Man's Land has Colorado on its north. Is it not as reasonable to suppose that Congress made an unintentional blunder in bounding the Indian Territory on the west by New Mexico, as by omitting from the northern boundary—if No Man's Land be included—the State of Colorado, which for one-third of its length is such boundary? Plainly

enough, there is a mistake in the statute—a mistake which is irreconcilable, because New Mexico cannot be the western boundary unless Colorado is a portion of the northern boundary. How, then, is this mistake to be resolved? It need not, we think, be said that in all cases of jurisdiction when life and death are involved, a court is bound, by every consideration, not only of humanity but of well-recognized rules of construction, to resolve against the jurisdiction. As was said by this Court in *Ex parte Crow Dog* (109 U. S. 556): "It is a case involving "the judgment of a court of special and limited "jurisdiction, not to be assumed without clear war- "rant of law. It is a case of life and death."

No Man's Land, if included at all, is included by an erroneous boundary.

As originally introduced by Mr. Culbertson, of Texas, House Bill 1874, 1st session, 50th Congress, it did not contemplate the establishment of a court at Muscogee, which was a Senate measure, and the bill, as finally enacted, was the result of a conference committee between the two Houses.

The report of the House Committee on the Judiciary, filed by Mr. Culbertson (Report No. 1007) March 10, 1888, states with great force the ends sought to be attained, namely: A more equitable division of the jurisdiction over the territory, so that the convenience of the people would be enhanced by attaching them to districts more accessible and more economically reached. It proposed to deal only with territory which, at the time the bill was introduced,

belonged either to the Western District of Arkansas or the Northern District of Texas, and was confined to the Chickasaw and Choctaw Nations, not disturbing existing jurisdictions as to any other part of the Territory. The Northern District of Texas included not only the Panhandle, but a large portion of the main body of Texas, lying immediately south of the Indian Territory. We quote from the report as follows:

"The Chickasaw and Choctaw Nations lie north
" of the State of Texas and contiguous thereto; and
" their social and commercial intercourse are with the
" people of north Texas, and have always been since
" the earliest settlement of the respective countries.
" The Chickasaw and that part of the Choctaw Na-
" tion which is proposed to be attached to Texas for
" judicial purposes, have no commercial intercourse
" with the people of Arkansas. The average distance
" of travel from the Chickasaw Nation to Fort Smith,
" where the Federal court is held, is estimated to be
" not less than 250 miles by land, or 500 miles by
" railroad; and the same may be said of the southern
" part of the Choctaw Nation, which is proposed to
" be attached to Texas. The loss of time, expense,
" and inconvenience incurred by litigants, witnesses,
" and other persons residing in these localities who
" may be required to attend the court at Fort Smith,
" strongly impress your committee that it is the duty
" of Congress to provide more convenient and acces-
" sible places for holding the courts which exercise
" jurisdiction over the territory." * * *

"There can be but little doubt in the minds of
" any one who will examine the map and consider the
" lines of travel from the remote sections of the In-

"dian Territory to Fort Smith that much of such ex-
"penditure is wholly unnecessary, and will be
"avoided by the changes proposed by the substitute
"reported by the committee."

* * * * * *

"It leaves the northern district with sufficient
"population and business to employ all the time of
"the judge of that district, and adds no more to the
"labors of the judge of the eastern district than
"should be added. It tends to equalize the labors of
"the officers of the districts. It gives to the Indian
"population the best facilities for enforcing law and
"preserving order which can be suggested, and fixes
"the locations of the courts which are to exercise
"jurisdiction over them *at cities where they trade,*
"*and where their social, commercial, and business*
"*relations are already formed.*"

The bill, as it became a law, was much enlarged in its scope by providing for a court at Muscogee, with jurisdiction limited to minor offenses. The readjustment of jurisdictions was made substantially as provided for in the House bill reported upon by Mr. Culberson, while the provisions for a court at Muscogee were substantially in accordance with the Senate bill No. 27 introduced by Mr. Vest. In other words, each House having a measure which it desired to pass, the Conference Committee agreed upon a bill which embraced the substantial features of both measures; and this became the act of 1889.

Whatever weight may be attached to the expressed views of legislators, while conducting legislation, as to its scope, purposes, and end to be attained, it is plain that the views of the House Judiciary

Committee above quoted, emphasize with exceeding force the proposition that the act of 1889 was not intended to include No Man's Land. Confessedly all there is in the act upon which to base an argument that No Man's Land is included, is that the territory is by the act bounded *west by New Mexico.* But this, as we have shown, cannot be the true boundary unless the northern boundary is erroneously stated. The whole act shows that the mistake was made in the western bounday and not in the northern; that Kansas was intended to be the northern boundary, and, therefore, New Mexico could not be the western.

It devolves upon this Court then to say what was the true intent of Congress. It is for this Court to correct the mistake which Congress made in defining the boundaries, and to do so in harmony with the spirit and purpose of the act. There can be, we submit, no reconciliation of the erroneous boundary with the other provisions of the act except to hold that No Man's Land was not included in its scope.

The Act Organizing Oklahoma Territory.

A year after the act of 1889, Congress organized Oklahoma Territory by an act entitled "An act to "provide a temporary government for the Territory "of Oklahoma, to enlarge the jurisdiction of the "United States court in the Indian Territory, and "for other purposes" (Stat. U. S., 1st session, 51st Congress, page 81).

The very first sentence of the act organizing Ok-

lahoma Territory deals with the Indian Territory and the Public Land Strip as two distinct and separate regions. The language is: "That all that "portion of the United States *now known as the In-* "*dian Territory*, except so much of the same as is "actually occupied by the five civilized tribes, and the "Indian tribes in the Quapaw Indian Agency; and "except the unoccupied part of the Cherokee outlet, "*together with that portion of the United States* "*known as the Public Land Strip*, is hereby erected "into a temporary government by the name of the "Territory of Oklahoma. The portion of the *In-* "*dian Territory* included in said Territory of Okla- "homa is bounded by a line drawn as follows: "Commencing at a point, &c.; * * * the *Pub-* "*lic Land Strip* which is included in said Territory "of Oklahoma is bounded east by the one hundredth "meridian, south by Texas, west by New Mexico, "and north by *Colorado* and Kansas."

"Now known as the Indian Territory," is the language of Congress more than a year after the act of 1889 went into effect. This significant language puts an end, as it seems to us, to the idea that the regions known as the Indian Territory and the public land strip were undistinguished, and it answers conclusively the assertion that they had been united together either in the popular understanding or by legislative action. In numerous sections of the act organizing Oklahoma, the public land strip is mentioned by name. Indeed, the condition of the public land strip was one of the moving causes to the passage of

the Oklahoma bill. It contained a large area of lands which were public, and which it was felt ought to be opened to settlement and brought within the jurisdiction of the courts.

The Oklahoma bill was reported upon by the Committee on Territories of the House of Representatives by Report No. 66, February 15, 1890. The report contains an elaborate argument giving the reasons for the passage of the bill. Among the most cogent and most urgently insisted upon was the condition of the public land strip, in regard to which the committee used this language:

"The Public Land Strip.

"Your committee are informed, upon information "deemed reliable, that a large number of persons, "estimated as high as 10,000, have settled upon that "portion of the area embraced within the provisions "of this bill, known as the Public Land Strip. The "probabilities are that the number of persons who "will settle upon this land in the near future will "be much greater. Should the land embraced within "this area be opened to homestead settlers, as pro-"vided in this bill, it is believed that the whole "amount would be taken under the homestead laws "within one year from the passage of the act. The "information also received by your committee in "regard to this land is to the effect that it is well "adapted to agricultural purposes; that the climate "is salubrious; that the water is reasonably plenti-"ful, and that there are other valuable resources, "such as coal, building material, etc.

"The people now settled upon the Public Land Strip

" can not acquire a legal title to the land. They are " without local laws for their government, except such " as have been enacted by a provisional council " known as the 'Council of the Territory of Cimar- " ron.' This council has assumed to exercise legis- " lative power upon very few subjects, only such " matters being embraced as are absolutely necessary " for the temporary security of persons and property. " The Territorial Council sent a memorial to the last " Congress, praying for authority to organize a gov- " ernment which will afford protection to persons " and property. In other words, they desire a Ter- " ritorial government, and are willing to be embraced " within the provisions of this bill. The number of " people who have already settled upon the Public " Land Strip is such as to imperatively require the " interposition of Congress, so as to afford them the " protection of the law, and enable them to secure " titles to the land.

" Your committee are of the opinion that in order to " enable the settlers already there and those who may " come after them to secure titles to the land, that " the provisions of the homestead law should be ap- " plied, and that a local territorial government should " be afforded them, as provided in this bill. *It would* " *not be expedient to attach the Public Land Strip to* " *any State or Territory for judicial purposes, or to* " *extend the land laws of the United States over that* " *region without, at the same time, affording the peo-* " *ple residing there the protection of local government.* " If the land laws of the United States should be " extended over the Public Land Strip, and no local " government provided, the opportunities for frauds " upon the public domain in connection with land " entries would be afforded and no adequate means " of preventing them would be provided. Your

" committee are therefore of the opinion that the in-
" terests of the United States, as well as those of
" the people who may reside upon the Public Land
" Strip, imperatively require that local self-govern-
" ment and the homestead laws, properly guarded,
" should be afforded them. This is accomplished in
" the bill for the organization of the Territory of
" Oklahoma."

Finally, the very last official utterance of the Land Department, namely, the Annual Report of the Commissioner of the General Land Office, for the fiscal year ending June 30, 1890, laid before Congress at its present session (Report Commissioner General Land Office, 1890, page 49), that officer says:

" Under the provisions of 'An act to provide a
" 'temporary government for the Territory of Okla-
" 'homa, to enlarge the jurisdiction of the United
" 'States courts in the Indian Territory, and for other
" 'purposes,' approved May 2, 1890, the Public Land
" Strip, which is bounded *east by the one hundredth*
" *meridian*, south by Texas, west by New Mexico,
" and north by Colorado and Kansas, was included
" in the limits of the Territory of Oklahoma."

Speaking of the surveys contracted for on the Public Land Strip, he says (p. 49):

" The surveys contracted for extend westward from
" the eastern boundary of the strip (the one hundredth
" meridian and the *west boundary of the Indian Ter-*
" *ritory*), and embraces ranges 28 to 15 east, inclu-
" sive."

Keeping in view that the question is, what was the region *known* as the Indian Territory, we think no more conclusive showing could possibly be made than that by which the fact that the Indian Territory terminated at the one hundredth meridian, is established.

But it will doubtless be contended by the Government that a treaty was once made between the Government and the Comanche and Kiowa Indians establishing a reservation for these tribes which included No Man's Land (14 Statutes-at-Large, p. 717). This contention, if made, admits of a clear and satisfactory answer. By the act of June 30, 1834 (4 Stats. 729), sections 1 and 25 expressly limit the Indian country to that part of the United States west of the Mississippi and not within the States of Missouri and Louisiana or the Territory of Arkansas. The Indian country west of the Mississippi was bounded on the west "by the Mexican possessions "and on the south by the Red River." By the treaty between the United States and Spain of February 22, 1819, ratified the 22d of February, 1821, "the one hundredth meridian of longitude west from "London and twenty-third west from Washington" was made the boundary line between the two countries. The treaty with the Comanches and Kiowas of October 18, 1865 (above mentioned), described in its second article an extensive tract of country, embracing a very considerable part of the State of Texas, and a large portion of the Indian Territory which had been patented to the Cherokees,

and a large region beside which was either owned by or had been assigned to other tribes. On comparing the description in this article with the map, it will be seen to have been founded on an obvious mistake and contained impossible boundaries, for it need not be said that the Government could not turn the State of Texas into an Indian reservation. Before the provisions of this treaty were carried out the blunder seems to have been discovered, and a new treaty between the same tribes and the United States was concluded October 21, 1867, proclaimed August 25, 1868, and found in 15 Stats. at page 581. The second article of this treaty defined and limited the reservation, bounding the same on the west by the one hundredth meridian of longitude, thereby correcting the mistake of the former treaty which had included "No Man's Land" and a large portion of the State of Texas as a part of said reservation. If, therefore, the treaty of 1865 would have made "No Man's Land" part of the Indian country, clearly that was undone by the treaty of 1867, which superseded or took the place of the treaty of 1865. The sixteenth article of the treaty of October 21, 1867, provides as follows:

"Article XVI. The tribes herein named agree,
" when the agency house and other buildings shall
" be constructed on the reservation named, they will
" make said reservation their permanent home and
" they will make no permanent settlement elsewhere,
" but they shall have the right to hunt on the lands
" south of the Arkansas river, formerly called theirs,

"in the same manner, subject to the modifications "named in this treaty, as agreed on by the treaty of "the Little Arkansas, concluded the eighteenth day "of October, one thousand eight hundred and sixty-"five."

If it shall be contended that "the right to hunt "on the lands south of the Arkansas river, formerly "called theirs," would have the effect to make all of that country south of the Arkansas river formerly claimed by these tribes Indian country, it is made clear by the provision of the treaty of 1865 that this country south of the Arkansas on which the right thus to hunt was reserved did not include or embrace "No Man's Land." That provision is as follows:

"Article III. It is further agreed that until the "Indians parties hereto have removed to the reser-"vation provided for by the preceding article, in "pursuance of the stipulations thereof, said Indians "shall be and they are hereby expressly permitted "to reside upon and range at pleasure throughout "the unsettled portions of that part of the country "they claim as originally theirs, which lies south of "the Arkansas river, *as well as* the country embraced "within the limits of the reservation provided for "by the preceding article, and that they shall and "will not go elsewhere, except upon the terms and "conditions prescribed by the preceding article in "relation to leaving said reservation." * * *

It thus appears that the country south of the Arkansas as originally claimed by these Indians, whatever

might be its area or extent or boundaries, was outside of the country specifically bounded in the treaty of 1865.

The treaty of 1865, therefore, cannot be invoked as changing the character of No Man's Land.

The Government will also doubtless call the attention of the Court to the act granting a right of way through the Indian Territory to the Chicago, Kansas and Nebraska Railway Company, approved May 2, 1887 (24 Stat. 446). The first section grants the right of way to the railroad company "through the Indian "Territory, beginning at the point on the northern "line of said Territory at or near the south line of the "State of Kansas, crossed by the 101st meridian; "thence in a southwesterly direction," &c. Undoubtedly, this language does assume that the country to be traversed by the railroad was Indian Territory. The language is simply a misrecital of the fact, and cannot be held to operate as a substantive legislative declaration as against the enormous weight of evidence that neither in law nor in fact was No Man's Land a part of the Indian Territory.

If No Man's Land was a part of the Indian Territory when the act granting the right of way to the Chicago, Kansas and Nebraska Railway was passed in 1887, it would be interesting to learn how it ceased to be Indian Territory between that date and the act of 1890, organizing Oklahoma Territory, in which act both the Indian Territory and the Public Land

Strip are described and the boundaries of the Public Land Strip defined.

The explanation of the recital under the act of 1887 is simple and obvious. It was a private act, and presumably drawn by a representative of the beneficiaries. It included also two lines of road which did run through the Indian Territory, and the person drawing the bill did not distinguish between the Indian Territory and the Public Land Strip west of it. The distinction between statutes which merely make a recital as to a certain fact and statutes which distinctively legislate in relation to the fact, is well understood. And while we freely concede that the act granting the right of way to the Chicago, Kansas and Nebraska Railway Company may fairly be cited by the Government to support its contention, we submit that it can have but little effect in opposition to the overwhelming weight of Congressional and Executive evidence that No Man's Land was not a part of the Indian Territory.

An illustration of the inadvertent use of erroneous words in a statute, is found in an original Bill in Equity now pending in this Court in a suit brought by the United States against the State of Texas to settle the jurisdiction of what is known as Greer county. The bill alleges that the region known as Greer county is a part of the Indian Territory and that it is claimed by the State of Texas. In the act of February 24, 1879, creating the northern judicial district of Texas (20 Stat. 318), Greer county is enumerated as

one of the counties of Texas, and the bill brought by the Government, now on file in this Court, alleges:

"Your oratrix further states that after the organ-
" ization of said territory into a county by the name
" of Greer county, as aforesaid, the said county was
" designated as such upon certain maps of the State of
" Texas, but was never so recognized by or upon
" any map published by or under any authority of
" the United States; that on the 24th day of Feb-
" ruary, in the year 1879, the Congress of the United
" States passed an act creating and establishing the
" northern judicial district of Texas; that in arrang-
" ing said district access was had to one of said maps
" of Texas upon which Greer county was designated
" as aforesaid, and that *by inadvertence the said Ter-*
" *ritory was included in said judicial district as a*
" *part thereof.*"

In like manner, we submit, that the inadvertent and erroneous recital of the fact in the act granting the right of way to the Chicago, Kansas and Nebraska Railway Company cannot be treated as changing the status of No Man's Land.

The Act of 1889 was not Intended to be Retroactive, and does not Operate upon Offences Committed Before its Passage.

We believe we have shown that No Man's Land has never been a part of the Indian Territory or the Indian country, and that it remained unaffected in its status by either the act of 1883 or the act of 1889.

We come now to another proposition which is

equally clear and indisputable, namely, that the act of 1889, attaching certain portions of the Indian Territory to the eastern district of Texas, contains no provision manifesting an intention that it should relate back to offences committed prior to its passage. The offence is alleged to have been committed July 25, 1888; the act in question went into effect March 1, 1889. The eastern district of Texas, therefore, can only have jurisdiction of the offence by giving the act of 1889 a retroactive effect.

The language annexing a portion of the Indian Territory to the eastern judicial district of Texas, is as follows:

"Shall, from and after the passage of this act, be "annexed to and constitute a part of the eastern judi- "cial district of the State of Texas for judicial pur- "poses." (Sec. 17.)

And the language conferring jurisdiction is as follows:

"And the United States courts herein provided "to be held at Paris shall have exclusive original "jurisdiction of all offences committed against the "laws of the United States within the limits of that "portion of the Indian Territory attached to the "eastern judicial district of the State of Texas by "the provisions of this act, of which jurisdiction is "not given by this act to the court herein established "in the Indian Territory." (Sec. 18.)

It is a familiar rule of construction that all statutes are considered as operating only upon future

acts and events, unless the contrary clearly and unmistakably appears; and the question is, whether Congress, by annexing a portion of the Indian Territory to the eastern district of Texas, intended, without expressly so declaring, to give that court jurisdiction of past as well as future offences. The rule that statutes shall not act retroactively is founded in natural justice. It is embodied in the constitutions of many of the States, and everywhere within the range of the jurisprudence of English-speaking people it has been asserted and upheld. The reasons given by judges and writers for this rule are numerous, such as, that "legislation of this "character is exceedingly liable to abuse" (Cooley's Constitutional Limitations, 456); "the recognized injustice of a method of making laws by which the legislature looks backward to discover past errors to be corrected and past grievances to be remedied" (Wade, Retroactive Statutes, 34); "the presumption that the legislature does not intend what is unjust" (Endlich on the Interpretation of Statutes, 272); "retrospective laws are wholly injurious, oppressive, and unjust" (Constitution of New Hampshire); "such laws, as a general rule, are objectionable in principle and unjust in practice" (Sedgwick on the Construction of Statutory and Constitutional Law, 173).

Similar denunciations of retrospective laws could be quoted *ad infinitum*. From the universal opinion of their injustice has grown the rule which forbids that a statute shall be deemed retrospective in its

operation unless the will of the legislature, clearly and unequivocally expressed, compels such construction. Undoubtedly, unless restrained by constitutional limitations, or by the inherent limits of the law-making power, retrospective laws may be passed. The legislature may, if it will, do an unjust thing, but it may not ask the courts to assist. It cannot prevent the judicial department of the Government from seeing to it that the legislative intent to commit an injustice shall be clearly and explicitly manifested. Professor Sedgwick (Statutory and Constitutional Law, 166) says of retrospective legislation:

"The only judicial check on the power being that "the courts refuse to give statutes a retrospective "construction unless the intention is so clear and "positive *as by no possibility* to admit of any other "construction; but on the other hand it is equally "true that they are greatly discountenanced, and "that the desire and effort of the courts is always to "give the statute a prospective operation only."

Now, the act of 1889 not only does not show clearly and unequivocally that Congress intended it to have a retrospective operation, but the language clearly shows the reverse. The territory annexed to the eastern district of Texas is to be annexed, in the words of the statute, "from and after the passage "of this act," and the jurisdiction clause also shows the intention to have the act operate in the future, by the words, "shall have exclusive, original juris-"diction of all offences committed against the laws

"of the United States," etc. Where is the unmistakable evidence in this language that Congress intended that the act should take hold of offences already committed? Can it be said that its intention to do so is made clear beyond a reasonable doubt? Is it, in the language of Professor Sedgwick (*supra*), "so clear and positive *as by no possibility* to admit "of any other construction?" Instead of clearly showing such an intention, the language, by its plain and natural grammatical construction, indicates that the statute was to operate prospectively and not retrospectively.

The contention of the Government is, that the words in the statute, "all offences *committed*," ought to be given the same meaning as if they read, "all offences *which have been* committed." Clearly enough, they do not mean that; and clearly enough, if Congress had intended they should, it would have been easy to find words to express such intention. So far as the language to be construed is concerned, this case is singularly like *Prince* v. *The United States* (2 Gallison, 204). In that case the language construed was found in the act of August 2, 1813 (3 Statutes, 75). It was an act allowing a deduction of 33⅓ per cent. on the amount of duties then imposed by law on cargoes of ships captured and brought into American ports during the war of 1812. The words to be construed were, "*Captured* from the enemy;" and the question was whether these words included captures made prior to the passage of the act. The Court will perceive

that the grammatical question is identical with the one in the case at bar. "Captured" was the verb used in that statute, "committed" is the verb in this. The decision was made by Mr. Justice Story at the circuit. He used this language:

"It is a general rule that statutes are to be con-
" strued to operate *in futuro*, unless from the lan-
" guage a retrospective effect be clearly intended.
" '*Nova constitutio futuris formam imponere debet, et*
" '*non preterites.*' And this maxim applies as well
" to remedial as to other statutes. There is nothing
" in the wording of this act which points to a retro-
" spective operation, and the whole intent may be
" satisfied by restraining it to future cases. On the
" other hand, if a retrospective effect is to be given
" to this act, the provision must equally apply to all
" cases of capture made since the war, whether the
" duties have been paid or not. The words must
" either read 'on all goods, etc., which *have been* cap
" 'tured from the enemy, and which *have been* made
" 'good and lawful prize of war, etc., and *have been*
" 'brought into the United States,' or 'on all goods,
" 'etc., which *shall be* captured from the enemy, and
" '*shall be* made good and lawful prize of war, etc.,
" 'and *shall be* brought into the United States,' etc.
" Independent of the objection to the former con-
" struction, which I have already stated, it is decisive
" against it, that the manifest object of the legisla-
" tion would be defeated, for the act would have
" spent its whole force on past cases, and could not
" operate *in futuro*."

It is only necessary to substitute "committed" for "captured," and we can say of the statute of

1889, paraphrasing the language of Judge Story, it must either read "*have been* committed," or, "*shall be* committed;" and the latter reading is the only one consistent with sound construction, and a fair and enlightened administration of justice.

The case of *United States* v. *Heth*, 3 Cranch, 398, is also distinctly in point. It involved the construction of the act of May 10th, 1800, entitled, "An "act supplementary to an act entitled, 'An act to "'establish the compensation of the officers em-"'ployed in the collection of the duties on impost "'and tonnage.'" (2 Stat. 72.)

The second section of the act allowed, in lieu of the commissions theretofore allowed by law, a different commission on all moneys which should be collected and received by them "for and on account "of duties arising on goods, wares, and merchandise "*imported* into the United States, and on the ton-"nage of ships and vessels."

As by this act the commissions of the defendant as collector of the port of Petersburgh were diminished, he claimed that the statute could not operate to deprive him of the commissions to which he was entitled by law, on goods imported before the passage of the act. Several of the justices of this Court delivered opinions. Mr. Justice Johnson used this language:

"The words of the act, 'arising on goods im-"'ported,' although in themselves very indefinite in "point of time, will receive a precise signification in "this respect by supplying the words 'heretofore,'

"to give them a past, or 'hereafter,' to give them a "future, signification. If it be necessary that the "court should make an election between these words, "in order to complete the sense, the choice will be "immediately determined by recurring to two well-"known rules of construction, viz: That it ought "to be consistent with the suggestions of natural "justice, and that the words should be taken most "strongly *contra proferentem*."

Mr. Justice Washington said:

"I am strongly inclined to the opinion that every "part of this section is future, and that a literal "construction will render it entirely prospective "upon the whole subject. The time at which the "substitution of two and a half for three per cent. "is to take place, as well as that of collection and "receipt, are certainly future, and there is, I think, "as little doubt that those receipts can only apply "to duties which should arise after the same period, "the word *arising* being clearly future in relation to "the time specified in the section. The word *im-*"*ported*, though past in relation to the duties which "were to arise on the goods imported, may, never-"theless, be future in relation to the period when "the change of commissions was to take effect; and "I think it ought to be so construed in this case, "because the duties arise either immediately upon "the importation of the goods, or upon the perform-"ance of some acts which, in contemplation of law, "are immediately to follow the importation."

So, in the case at bar, Congress was legislating for the future. It was providing that "from and after "the passage of this act" certain territory should be

annexed to the eastern district of Texas, and that a certain court should have jurisdiction; and the verb "committed," used in the statute now before the Court, bears the same relation to the other portions of the sentence in which it stands as the verb "imported" did in the statute involved in the Heth case.

Again quoting from the opinions of the justices in the Heth case, Mr. Justice Paterson used this language:

> "Words in a statute ought not to have a retro-
> "spective operation, unless they are so clear, strong,
> "and imperative, that no other meaning can be an-
> "nexed to them, or unless the intention of the legis-
> "lature cannot be otherwise satisfied."

Such, then, is the doctrine of this Court; and, applying it to this case, the claim that the act of 1889 should have a retrospective effect vanishes; for it cannot be contended that the language of the act is is either so clear, strong, or imperative as to require that it should be given a retrospective operation. Surely the safeguards of the law are not less sacred when human lives are involved than when the fees of a collector of customs are in danger of being diminished.

In the case of *The United States* v. *Starr*, Hempstead's C. C. Reports, 470, practically the same question was involved that is now before this Court. Starr was indicted in the Circuit Court for Arkansas for a crime alleged to have been committed in the

Indian country before its annexation to Arkansas for judicial purposes.

The opinion of the Court was delivered by Johnson, J., who used the following language:

"It seems to me plain that at the time the offence "charged was committed, neither this court, nor any "other court of the United States, had power and "jurisdiction to hear, try, and punish it. Indeed, it "is manifest that from the time this court was cre-"ated, on the 3d day of March, 1837, up to the 17th "day of June, 1844, there existed no judicial tribu-"nal of the United States competent to try and pun-"ish offences committed in this Indian country, and "so this court decided, in the case cited, when its "presiding Judge (Hon. Peter V. Daniel), was pres-"ent. And to give that jurisdiction was the sole "object of the act of the 17th day of June, 1844. "It is, however, insisted that this act confers upon "this court jurisdiction to punish all offences against "the laws of the United States committed in the "Indian country—those before as well as those after "its enactment. The argument is that the crime "was committed against an existing law, and within "the jurisdictional limits of the United States, "although this Court could not then, yet may now, "punish it; and in carrying out this idea it is said "by the district attorney, to get clear of a difficulty "which lies in his path, that it is not a case where "there was no law anterior to the 17th of June, "1844, creating the offence, and then doing it for the "first time, for that, he concedes, would be an *ex* "*post facto* law within the rule laid down in *Calder* "v. *Bull*, 3 Dallas, 386; but he insists without cre-"ating any new offence, the law merely designates

" a tribunal to punish one already committed against " an existing law of the United States forbidding it.

" If this be a sound position, then it is manifest " that the act must have a retrospective operation; " because, otherwise, it could not affect transactions " which took place before its passage. The crime " charged against the prisoner, as stated, was com- " mitted when neither this nor any other court of the " United States was clothed with jurisdiction and " power to try and punish it, and to proceed to do so " now would be to give the act in question a retro- " active effect.

" Now, in the construction of a statute it is a car- " dinal and well-established principle, that the court " will never give to it a retrospective operation, un- " less it clearly appears from the language used that " its makers intended it to have that effect; because " laws are generally made to operate upon the fu- " ture, not the past, transactions of men. (9 Bac. " Abr.; tit., *Statute*, C.) Legislatures seldom, if " ever, especially in the enactment of criminal laws, " intend them to have a retroactive effect, and cer- " tainly courts will never give them that operation, " even if it can be done at all, unless the intention " is clearly expressed. (*Prince* v. *The United States*, " 2 Gallison, 204.) Penal laws must be construed " strictly."

THE ACT OF 1889 HAS ALREADY RECEIVED A JUDICIAL CONSTRUCTION.—But the law of 1889 has already received a judicial construction by Judge Parker, of the United States district court for the western district of Arkansas, in the case of *United States* v. *Jo. Martin*, tried and convicted of murder committed in the Choctaw country prior to its annexation to the

eastern district of Texas for judicial purposes. In that case, as in this, the offence was committed before the act was passed, and the indictment was found after. Judge Parker held that the act of 1889 could not be construed retroactively, and that the jurisdiction of offences in the Choctaw country committed before the passage of the act remained in the district court of the United States for the western district of Arkansas. We give the opinion entire:

PARKER, J.: "The offence of which the defendant "was convicted in this case was committed in that "part of the Indian country annexed by the act of "Congress of March 1st, 1889, for judicial purposes, "to the Eastern District of Texas. The offence was "committed before the passage of the act. The de"fendant was tried and convicted of murder in the "United States Court of the Western District of "Arkansas.

"The defendant filed a motion for a new trial, "containing among other things:

"'*Third.* Because there is no lawful jurisdiction "'to try the defendant. The offence for which this "'defendant was tried and convicted was alleged to "'have been committed in that part of the Indian "'Territory annexed to the Eastern Judicial Dis"'trict of Texas by an act of Congress approved "'March 1st, 1889.

"'*Fourth.* Because all laws conferring jurisdic"'tion upon this court to try this defendant were "'repealed by an act of Congress entitled, "An act "'"to establish a United States court in the Indian "'"Territory, and for other purposes," approved "'March 1st, 1889.'

"The act of Congress of March 1st, 1889, says " nothing about where cases of crime shall be tried " when the crime has been committed in that part " of the Indian country which, by said act, was at- " tached to the Eastern District of Texas, when the " crime has been committed before the passage of " the act.

" The question is: 'Shall they be tried in the U. S. " ' Court at Paris, Texas, or in the U. S. Court at " ' Fort Smith, Arkansas, which had jurisdiction of " ' said crime before the passage of the act above re- " ' ferred to?' I think, situated as the Indian country " is, it not being a State, Congress could provide that " crimes committed in the Indian country attached to " the Eastern District of Texas, before the passage of " the law establishing the court at Paris, could be " tried by such court. If the Indian country was a " State, then the crime could not be tried in any " other district than one ascertained by law, previous " to the commission of the crime; as it is not a State, " Congress could, in the act above named, have pro- " vided for the trial at Paris, Texas, of cases where " the crime had been committed before the passage " of the law; although such a law would be retro- " spective in its operation, as it may be conceded that " a law retrospective in its operation, when the law " goes to the remedy alone, may be passed. But the " question here is simply one of construction. The " law above referred to is silent as to where crimes " committed before the passage of the law shall be " tried.

" In the construction of a statute it is a cardinal " and well-established principle that the court will " never give to it a retrospective operation, unless it " clearly appears from the language used that its " makers intended it to have that effect; because laws

" are generally made to operate upon the future, not " the past, transactions of men. (9 Bacon Abridg- " ment; title, *Statute*, C.)

" Legislatures seldom, if ever, especially in the " enactment of criminal laws, intend them to have a " retrospective effect; and certainly courts will never " give them that operation, even if it can be done at " all, unless the intention is clearly expressed. " (*Prince* v. *U. S.*, 2 Gall. 204.)

" The Supreme Court of the United States, in " *United States* v. *Heth*, 3 Cranch, 398, 413, said: " 'That words in a statute ought not to have a retro- " spective operation unless they be so clear, strong, " and imperative that no other meaning can be an- " nexed to them, or unless the intention of the legis- " lature cannot be otherwise satisfied.' The same court, in *Chew Heong* v. *The United States*, said: " Such is the settled doctrine of this Court." Such is shown to be the rule of statutory construction by *Murray* v. *Gibson*, 15 How. 421; *McEwin* v. *Din*, 24 How. 242; *Haney* v. *Tyler*, 2 Wall. 328; *Sohin* v. *Watterson*, 17 Wall. 596; *Twenty Per Centum Cases*, 20 Wall. 179; *United States* v. *Starr*, Hempstead's Rep. 469; Potter's Dwarris, Com. Stat. and Const. 162, 163, 164; *Chew Heong* v. *United States*, 112 U. S. 536.

" There is no language in this statute on the sub- " ject of where crime committed before the passage " of the act shall be tried; the law is entirely silent " in that particular.

" Therefore, there is no language on that subject " to construe, if there is no expression of the legis- " lative will in that regard.

" In such cases the court cannot construe the act to " have a retrospective effect, nor can the court pre- " sume that Congress intended that men who had

" committed crimes before the passage of the act of " March 1, 1889, in that part of the Indian country " by the act attached to the Eastern District of " Texas, should not be punished by any court.

" A court can never presume that a legislative " body so legislates as to establish an immunity from " punishment for criminals, but if the position that " such crimes cannot be punished in the Eastern " District of Texas or the Western District of Ar- " kansas is correct, such would be the result. I, " therefore, conclude the intention of Congress was " that the crimes which had been committed before " the passage of the law of March the 1st, 1889, " should be punished where the crimes committed in " the same country were punished before the passage " of the law, at the U. S. Court at Fort Smith, Ar- " kansas. The question to be distinctly recognized " in this case is, Did Congress by the terms used in " the act of March 1st, 1889, giving the District " Court in the Eastern District of Texas jurisdiction " over certain parts of the Indian country which, be- " fore the passage of that act had been within the " jurisdiction of the District Court for the Western " District of Arkansas, clearly express the intention " that the court at Paris, Texas, shall take cogni- " zance of past as well as future crimes?

" There is simply, absolutely nothing in the act " from which an inference can be drawn that it was " intended by its makers it should have a retrospec- " tive operation; the law-makers have neither said so " expressly, nor have they intimated that it should " have that effect. Upon the principle above named, " in the absence of any expressed intention to the " contrary, the court is bound to presume that the " makers of the law intended it to operate upon the " future and not upon the past.

"If a statute be not explicitly retrospective, the "court will not by construction give it a retrospec- "tive operation. (*Goshen* v. *Stonington*, 4 Conn. "209; 10 Am. Dec. 121.)

"If Congress did not, by explicit terms, make the "law retrospective, unless it intended that the Dis- "trict Court of the Western District of Arkansas ex- "ercise jurisdiction over offences of which it had "jurisdiction before the law was passed, and which "were committed before the law of March 1st, 1889, "passed, it intended to grant to criminals who had "committed crimes at such times immunity from pun- "ishment; that, the court cannot presume.

"The only rational construction then, is that such "cases are within the jurisdiction of the U. S. Court "of the Western District of Arkansas." (*U. S.* v. *Jo. Martin*, Western Dist. Arkansas, unreported.)

Now, if No Man's Land was annexed to the Eastern District of Texas by the act of 1889, it was annexed in the same sentence and by the same language that annexed the Choctaw country; and of course, it cannot be claimed that the act was to be construed *prospectively* as to the Choctaw country, and *retrospectively* as to No Man's Land.

Judge Parker very correctly stated that, inasmuch as the act could not by any possibility be construed to have a retroactive effect, the Western District of Arkansas must retain jurisdiction of offences committed prior to the passage of the act, or else immunity would be granted by the act for crimes committed before its passage. It need not be pointed out that in the case at bar, the act does not *grant* any

immunity for offences committed in No Man's Land, for the immunity already existed; nor need it be said that if there was no court when the act was passed competent to try offences in No Man's Land, the act of 1889 has not shorn the Government of its powers.

The Choctaw country prior to the act of 1889 belonged to the Western District of Arkansas. If the act of 1889 annexed both that country and No Man's Land to the Eastern District of Texas, it simply left both those regions, as to former offences, in the condition they were before the passage of the act. If no Man's Land was, prior to the act of 1889, a part of the Indian Territory annexed to the *Northern* Judicial District of Texas, then the act left the alleged offence still cognizable in the court of the Northern District of Texas.

The actual condition of things is that both the Western District of Arkansas and the Eastern District of Texas are asserting an equal right to hang men for offences committed before the passage of the act. The same Government which insists in Arkansas that the act is *prospective*, insists in Texas that it is *retrospective*. What has become of Jo. Martin we do not know. Having been convicted of murder in the Arkansas court, and a motion for a new trial overruled, he has, we presume, been executed, or will be. He has been, or will be executed, on the ground that the act of 1889 is *prospective;* while the plaintiffs in error here, if the judgment of the Eastern District of Texas is sustained, will suffer the

extreme penalty of the law because it is *retrospective*. So that the contention between the Government and ourselves as to whether the act is prospective or retrospective receives the exceedingly practical answer that it is *both*.

It is sometimes asserted that remedial statutes and statutes which simply regulate procedure are not within the rule forbidding that statutes shall be construed retroactively. To this it need only be answered that such a doctrine, if it exist at all, can have no application to such a case as this. In *United States* v. *Starr* (*supra*), and *United States* v. *Jo. Martin* (*supra*), as already shown, the doctrine that statutes shall not be construed to have a retroactive effect was asserted and enforced—in the former case upon a statute like this, and in the latter upon this very act of 1889; and Mr. Justice Story, in the *United States* v. *Prince* (*supra*), distinctly declared that the maxim which forbids that statutes shall be given a retroactive effect applies as well to remedial as to other statutes.

But what is the scope of the statute of 1889? Indeed, it deals with something more than mere procedure; with something more than pleading, practice, and evidence. It fixes the place of trial, and confers original jurisdiction upon a court. It determines where a citizen shall be placed on trial for his life. So great a question is this that the framers of the Constitution inserted a provision regulating the place of trial of persons accused of crime (sec. 3, art. 3), and in the ten amendments constituting the Bill of Rights,

as if not already satisfied with the safeguards thrown around the people in this respect, another provision was inserted in article 6 requiring that trials shall be "by an impartial jury of the State and district wherein "the crime shall have been committed, which dis- "trict shall have been previously ascertained by law."

Whether either of these constitutional provisions can be invoked for the protection of these defendants, is not now the question to which we direct the attention of the Court. Whether they are within the letter of these provisions or not, they are within the spirit of them. They are within the scope of the evils they were intended to prevent. The object of these Constitutional provisions was to give to persons accused of crime a trial by their neighbors and the inhabitants of the vicinage. They were intended to preserve the ancient rights guaranteed by the common law. There is no reason founded in justice or humanity, or in that equality of rights and privileges supposed to belong to all American citizens, why a man accused of crime in a Territory, or in a region outside of a Territory, shall not have every safeguard that the Constitution gives to one who lives within the limits of a State. If, therefore, the Constitution does *not* give to these defendants the protection which it gives to persons accused of crimes within the limits of a State, how much more does it become the duty of a court not to impose upon them also a harsh, rigorous, and illiberal construction of the statute.

The very object of the doctrine that statutes shall

not be construed to have a retroactive effect unless the language is so plain, strong, and imperative as to require it, is *to give to the citizen by a rule of construction that protection which the Constitution has not given him.* For instance, in New Hampshire, where all retroactive legislation is forbidden by the Constitution, there remains no occasion for invoking this rule; but where the Constitutional provision does not exist, *the rule of construction takes its place*, so far as it can; and except where the language is so plain and imperative as to become mandatory upon the courts, they protect the citizen by declaring that the statute must not be construed retroactively. So, in this case, if the Constitutional provisions regulating the place of trial of persons charged with crime is *not* applicable, they have all the more right to insist that they shall have the benefit of that common and universal rule for the retrospective construction of statutes.

And this, we respectfully submit, is a case in which, above all others, the great salutary rule of construction, to which we have alluded, should be upheld and enforced.

The defendants are citizens of Kansas. The offence with which they stand charged was committed in their own neighborhood, although outside of the limits of the State of which they were citizens. They were tried in a distant country; separated by hundreds of miles from the place where the alleged offence was committed. We need not point out the difficulty of securing the attendance of witnesses, and

the numerous disadvantages necessarily imposed upon them by the situation.

A statute which authorizes these things is not to be helped and aided by construction. If it stands at all, it must stand because the language is too plain to admit of doubt as to the legislative intention. If it is to have a retroactive effect, it must be because Congress has said so in language so plain as to admit of no other construction.

TO CONSTRUE THE ACT OF 1889 RETROACTIVELY IS TO MAKE IT EX POST FACTO.—To construe the act of 1889 retrospectively is to substantially make it an *ex post facto* law within the meaning of the Constitution.

The third subdivision of section 9, article 1, of the Constitution provides that no bill of attainder or *ex post facto* law shall be passed. If the act of 1889 is to be given a retrospective effect, it becomes to all intents and purposes an *ex post facto* law; that is to say, it subjects the defendants to disadvantages which the Constitutional provision was intended to prevent.

In the leading case of *Calder* v. *Bull*, 3 Dallas, 386, Mr. Justice Chase, delivering the opinion, defined the term *ex post facto* law as used in the Constitution:

"1st. Every law that makes an action done before "the passing of the law, and which was innocent "when done, criminal, and punishes such action.

"2d. Every law that aggravates the crime, or "makes it greater than when committed.

"3d. Every law that changes the punishment and "inflicts a greater punishment than was annexed to "the crime when committed.

"4th. Every law that alters the legal rules of "evidence, and receives less or different testimony "than the law required at the time of the commission "of the offence in order to convict the offender."

Afterwards, in *United States* v. *Hall*, 2 Washington, 366, Mr. Justice Washington, charging the jury at the circuit, added to the definition of Mr. Justice Chase in *Calder* v. *Bull*, *supra*, this definition:

"Or in short, which, in relation to the offence or "its consequences, *alters the situation of a party to* "*his disadvantage*."

This definition of Mr. Justice Washington has been adopted by this Court in *Kring* v. *Missouri*, 107 U. S. 221:

"We are of opinion" (said Mr. Justice Miller, "delivering the opinion of the Court), "that any law "passed after the commission of an offence which, in "the language of Mr. Justice Washington in *United* "*States* v. *Hall*, 'in relation to that offence or its "'consequences, alters the situation of a party to his "'disadvantage,' is an *ex post facto* law."

Let us inquire whether the act of 1889, if given a retrospective effect, has altered the situation of the defendants to their disadvantage. Prior to that act, they were either not triable at all, or triable in a district contiguous to the place where the offence is alleged to have been committed. In either case, to enact that they should be taken hundreds of miles

away to a remote district, among strangers, where the attendance of witnesses could be procured only with the greatest difficulty, beyond question changed their situation to their disadvantage. To give the law of 1889 a retrospective operation is therefore to declare that it is *ex post facto* and void.

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W. H. ROSSINGTON,
For Plaintiffs in Error.

JOHN F. DILLON,
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Of Counsel.

FILED
DEC 4 1890

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

NO. 1311.

C. E. COOK, O. J. COOK, CYRUS FREASE,
J. B. CHAMBERLAIN, JOHN JACKSON,
AND J. LAWRENCE,
Plaintiffs in Error,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

BY
JOHN F. DILLON,
WM. R. DAY,
JOSEPH FREASE.

GEO. R. PECK,
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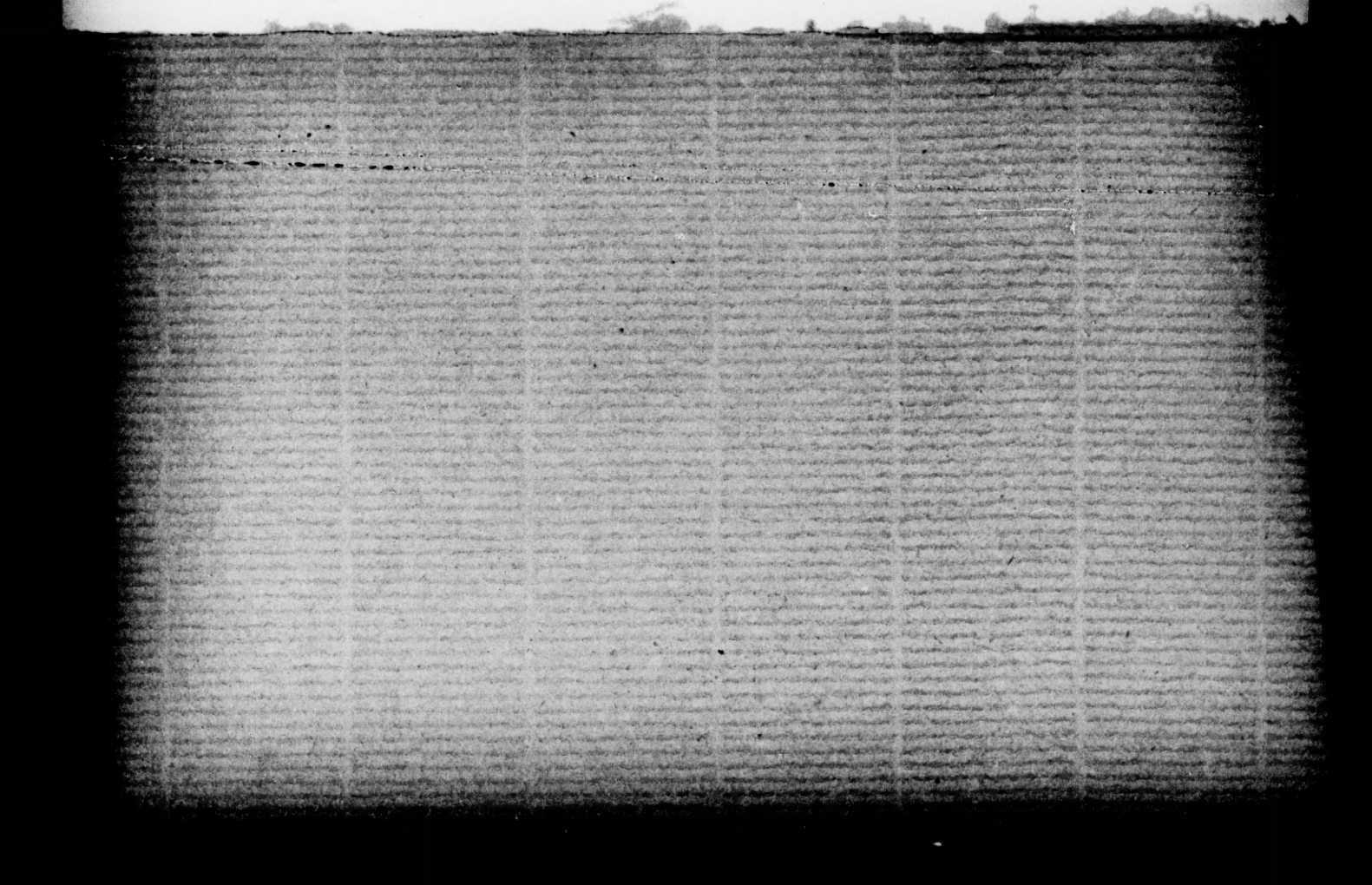

IN THE

Supreme Court

FOR THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1890.

C. E. COOK, O. J. COOK, CYRUS FREASE, J. B. CHAMBERLAIN, JOHN JACKSON and J. LAWRENCE,
Plaintiffs in Error,

vs.

THE UNITED STATES,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Statement of Case.

C. E. Cook, O. J. Cook, Cyrus Frease, J. B. Chamberlain, John Jackson and J. Lawrence, the plaintiffs in error, with twenty-four others, were, at the October Term, 1889, of the Circuit Court of the United States for the Eastern District of Texas, sitting at Paris,

Texas, indicted October 31 by a grand jury of said Court for the crime of the murder of one John M. Cross, on the 25th day of July, 1888, in the Neutral Strip, or No Man's Land.

The allegations of the indictment as to the time and place of the homicide and as to the jurisdiction of the said Circuit Court for the Eastern district of Texas, are as follows:

"Eastern District of Texas, sct.: The grand jurors of the United States of America, duly elected, impanelled, tried, sworn and charged to inquire into and due presentment make of offences against the laws of the United States of America *in and for the district and circuit aforesaid*, on their oath in said Court present: That heretofore, to wit, on the Twenty-fifth day of July in the year of our Lord one thousand eight hundred and eighty-eight, in that section of the country lying between Kansas and Texas, bounded on the west by New Mexico and extending east to the hundredth meridian of longitude, commonly called the Neutral Strip or "No Man's Land," in the Indian Territory, the same being attached to and constituting part of the Eastern District of Texas for judicial purposes, and within the jurisdiction of this Court," etc. (Here the indictment proceeds to charge the commission of the homicide.)

At the April Term, 1890, of said Court, the case came on for trial, by a jury, as to the plaintiffs in error and six others of those so indicted, to wit: A. M. Donald, J. A. Rutter, William O'Connor, J. W. Calvert, W. S. Grubb and Ed. Bowden. By the verdict of the jury the plaintiffs in error were found guilty of murder; a mistrial was returned as to the said Ed Bowden, and the others so placed on trial were acquitted.

The plaintiff in error then moved the Court for a new trial, and in arrest of judgment upon various grounds

stated in the motions, both of which were overruled, and the plaintiffs in error were severally sentenced to be executed on the 19th of December, 1890.

The plaintiffs in error took exceptions to the action of the Court in assuming jurisdiction of said case, and to various rulings made by the Court on the trial thereof in admitting evidence against them, and in excluding evidence offered by them, in the charge to the jury, in receiving the verdict of the jury, in proceeding to try the case prior to the October Term, 1890, of said Court, in overruling their motions for a new trial, and in arrest of judgment, in holding the indictment to be good, and in passing sentence against them, as aforesaid, and their Bill of Exceptions was duly allowed and signed by the Judge of said Court at said Term.

The plaintiffs in error afterwards, on the 6th day of September, 1890, and within the time allowed by said Court, filed in said Court a petition to this Honorable Court for a writ of error, which was on said day duly allowed, as provided by the Act of Congress of March 25, 1889 (25 Stats., 655), and afterwards errors were assigned in this Court.

See Act of Congress, of March 25, 1889, entitled,

" An Act to abolish Circuit Court powers of certain District Courts of the United States, and to provide for writs of error in capital cases, and for other purposes " (25 Stats., 655).

We proceed to notice the assignments of error.

ARGUMENT.

JURISDICTION OF THE COURT.

I.

The Circuit Court of the United States for the Eastern District of Texas had no jurisdiction of the offense charged in the indictment, for the following distinct reasons: *

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* The 26th and the 17th assignments of error relate to the subject of jurisdiction.

The twenty-sixth assignment of error is as follows:

TWENTY-SIXTH. The Court erred in assuming jurisdiction of and trying plaintiffs in error for an offense alleged to have been committed in the Neutral Strip or No Man's Land the 25th day of July, 1888, because on the 25th day of July, 1888, said Neutral Strip or No Man's Land was not attached to any judicial district of the United States for judicial purposes by any statute or law then in force; because the Court at Paris, Texas, was created by an Act of Congress, approved 1st day of March, 1889 (25 Stats., 783), long after the alleged commission of said offense; because the said Act of March 1, 1889, does not in terms or by implication attach said No Man's Land to the Eastern District of Texas for judicial purposes; because there is an extensive region of country lying between said No Man's Land and the extreme western boundary of the Eastern District of Texas as fixed by law; that at the time of the alleged commission of the alleged offense, and at the time of the creation of the said Court at Paris, said land so lying between was attached to another judicial district of the United States for judicial purposes; that said No Man's Land did not join and was not contiguous to the boundaries of the Eastern District of Texas as fixed by law.

The seventeenth assignment of error is as follows:

SEVENTEENTH. The Court erred in the following part of the charge to the jury, and overruling the exceptions of the plaintiffs in error thereto: "If you believe from the evidence that John M.

FIRST. The Neutral Strip or "No Man's Land" at the date of the homicide alleged in the indictment (July 25, 1888) was outside of the jurisdiction of any particular State or Federal district; and no Court of the United States had jurisdiction to prosecute criminally the alleged homicide; or, if any Court had jurisdiction, it was not the Circuit Court for the Eastern District of Texas, but was the district where the defendants were found or arrested.

SECOND. The allegation in the indictment on which the Court below assumed jurisdiction, viz., that on the 25th day of July, 1888, the Neutral Strip or "No Man's Land" was "in the Indian Territory, the same being attached to and constituting part of the Eastern District of Texas for judicial purposes, and within the jurisdiction of this Court," is untrue in point of fact and of law.

THIRD. If "No Man's Land" was, at the date of the commission of the alleged homicide (July 25, 1888), within or attached to any judicial district of the United States, it was the *Northern* District of Texas and not the Eastern District of Texas.

FOURTH. The Circuit Court of the United States

Cross was murdered in No Man's Land or the Neutral Strip, as hereinafter defined, prior to October 31st, 1889 [date of finding of the indictment], you are instructed that No Man's Land or Neutral Strip is within the jurisdiction of this Court, and if the party so killing said Cross have committed any offense they can be tried and punished in this Court."

See Motion for New Trial, 17th Ground.
See Motion in Arrest of Judgment, Grounds 1, 2, 3.

for the *Eastern* District of Texas assumed jurisdiction of the case by virtue alone of Section 18 of the Act of Congress approved March 1, 1889 (25 Stats., 786), which act if it extended the jurisdiction of the said Circuit Court for the Eastern District of Texas to offenses committed within the Neutral Strip, or "No Man's Land," did so only as respects offenses therein committed after the approval of said act; that is, after March 1, 1889, and the said act could not under the Constitution (Art. 3, Sec. 2) make a past offense triable in the new district created by said act instead of the district which existed when such offense was committed; nor could the said act be made retrospective, so as to embrace the homicide alleged in the indictment to have been committed on the 25th day of July, 1888, since that would make the act in this respect *ex post facto*.

The legislation and public acts immediately bearing upon the above propositions relating to the jurisdiction of the Circuit Court for the Eastern District of Texas are as follows:

THE INDIAN TERRITORY: What is known as the "INDIAN TERRITORY," and delineated on all the maps as such, is the country embraced within the boundaries specified in Section 24 of the Act of June 30, 1834 (quoted *infra*, p. 10).

The status of the region denominated "The Indian Territory" is peculiar. Under various treaties between the United States and certain Indian tribes, all lands therein are set apart to and are owned by these tribes;

and no part thereof is public land, except so far as they have been specially ceded back to the United States. Within the "Indian Territory" reside several of what are called the Civilized Tribes, who have governments of their own, modelled in a general way after that of the American States.

By reason of these circumstances—the ownership of the lands therein by the Indians, their occupancy and government thereof—the region thus owned, occupied and governed has long been known as the "Indian Territory." It is so referred to in many acts of Congress, particularly during the last twenty years.*

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* Act July 15, 1870 (16 Stats., 362, Sec. 12): President to provide Osages of Kansas "a permanent home in the Indian Territory," without otherwise defining the said Territory.

Act June 3, 1874 (18 Stats., 51), authorizes Secretary of War to construct telegraph line from Denison, Texas, "to Fort Sill, Indian Territory," and beyond, not otherwise defining the Indian Territory.

Acts March 3, 1875 (18 Stats., 421), and August 15, 1876 (19 Stats., 176, 272), make appropriations for Indian Agents for enumerated "tribes in the Indian Territory." And for expenses "of General Council of certain Indians in the Indian Territory," as provided by certain enumerated treaties: Creeks, Seminoles, Choctaws, and Chickasaws.

Appropriation Act, 1877 (19 Stats., 356), makes appropriation to retrace and mark "boundary line between the State of Arkansas and the Indian Territory."

Act February 28, 1877 (19 Stats., 254), prohibits the removal of the "Sioux Indians to the Indian Territory," without other definition. Same provision in Act 1879 (20 Stats., 313).

Act March 3, 1877 (19 Stats., 323, 338), establishing post roads from Muscogee and other places in the "Indian Territory." Same Act, 1878 (20 Stats., 21); same Act, 1879 (20 Stats., 437).

It is so described in authentic publications, and so delineated on all the maps, official and general.*

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* "Indian Territory is a tract of land in the southern central portion of the United States which has been set apart as a reservation for the use of various tribes of Indians. It lies between the parallels of 33° and 37° N. lat. and the meridians of 17° and 23° W. long. of Washington (94° and 100° W. of Greenwich). It is bounded north by Kansas, east by Missouri and Arkansas, and south and west by Texas." 12 Encylop. Brit., 9th Ed., Art. "Indian Territory," by Henry Gannett. The maps in that work show the Indian Territory as not embracing "No Man's Land" (Vol. 12, p. 834; Vol. 23, Art. United States, between pp. 790, 791).

In the latest edition of the Scribner—Black Atlas, A. D. 1890—the best standard atlas published—the maps all show the Indian Territory as having the boundaries last above described. All other standard atlases also give the same boundaries.

The Indian Territory is bounded in the same way in the American Encyclopædia: see word *Indian Territory*, that is to say, it does not include the region known as the Neutral Strip, or "No Man's Land" (Vol. , p.).

The following is an extract from the "American Encyclopædia":

"INDIAN TERRITORY, a large tract of land * * * between latitude 33° 30′ and 37° north and longitude 94° 20′ and 100° west. It is bounded north by Kansas, east by Missouri and Arkansas, south by Texas, from which it is divided by the Red River, and west by Texas, &c., *on the 100th meridian*. It is inhabited chiefly by immigrant Indians of various tribes and nations, and to some extent by indigenous tribes. * * * The Indian Territory was originally part of Louisiana. It is not organized like other territories of the United States, but certain portions of it have been granted from time to time to the nations now inhabiting it."—Am. Encycl., Art. Indian Territory, A. D. 1863.

"From an early period," says Mr. Kennedy, "after the compact [between Georgia and the United States in 1802] the scheme of providing a new territory beyond the limits of the States for the final settlement of the Indian tribes was more or less distinctly announced. In 1808–9 Mr. Jefferson had this subject before him in a proposition to establish a portion of the Cherokee tribe west of the Mississippi. This suggestion gradually expanded until it finally assumed the shape of an organized and broad scheme of policy under the administration of Mr. Monroe. Large tracts were purchased beyond the frontier States towards the borders of Mexico, and suitable provision made for the transfer of the tribes to this region. In 1817 one-half of this tribe of the Cherokees emigrated

And none of these maps include within the "Indian Territory" the land called the Neutral Strip, or "No Man's Land." This latter is public lands of the United States acquired from Texas, as hereinafter shown, and no part of it is occupied. Since its acquisition by the United States no part of it has been occupied by Indian tribes, and it is no part of what is known as the "Indian Territory." Its *status* is in every respect different from the status of the Indian Territory. And unless it is made part of the Indian Territory for certain purposes by the Act of March 1st, 1889 (25 Stats., 783 quoted *infra*, p. 17), it was never by any prior Act of Congress made, treated or recognized as part of the "Indian Territory."

NO MAN'S LAND. What is called in the indictment the Neutral Strip or "No Man's Land" was originally part of the Republic of Texas, or, still further back, of the Republic of Mexico. On March 1, 1845 (5 Stats., 797), Congress passed a "Joint Resolution for annexing Texas to the United States." This resolution provided, *inter alia*:

"*Third.* New States, of convenient size, not exceeding four in number, in addition to said State of Texas, * * * may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the Federal Constitution. And such States as may be

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beyond the Arkansas."—Kennedy's Life of West, Vol. 2, Chap. XV., p. 244.

After the memorable contest of the residue of the Cherokees with the State of Georgia in 1830-31, in which the treaty guarantees of tribe failed to protect them on the small remnant of their possessions, the rest of the tribe removed to their present home in what is known as the Indian Territory.

formed out of that portion of said territory *lying south of thirty-six degrees, thirty minutes* north latitude, commonly known as the *Missouri compromise line*, shall be admitted into the Union with or without slavery, as the people of each State asking admission may desire. And in such State or States as shall be formed out of said territory *north* of said Missouri compromise line, slavery, or involuntary servitude (except for crime), shall be prohibited."

"No Man's Land" has an interesting historical origin. It constituted in 1845 that part of the Texan territory which lay *north* of the parallel of thirty-six degrees, thirty minutes. Under the Act of September 9, 1850 (9 Stats., 446), Texas agreed that her boundary on the north should be the parallel of thirty-six degrees, thirty minutes. The second paragraph of Section 1. is as follows:

"Second. The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement."

The territory thus ceded is what is called, in the indictment, the Neutral Strip or "No Man's Land."

By the Act of June 30, 1834 (4 Stats., 729, 733), entitled "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," it was provided as follows:

"SEC. 1. *Be it enacted*, &c., That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, and also that portion of the United States east of the Mississippi River, and not within any State to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country."

"SEC. 24. *And be it further enacted*, That for the sole purpose of carrying this act into effect, all that part of the Indian country west of the Mississippi River that is bounded north by the *north line of lands assigned to the Osage tribe of Indians, produced east to the State of Missouri; west, by the Mexican possessions; south, by Red River; and east, by the west line of the territory of Arkansas and the State of Missouri, shall be, and hereby is, annexed to the Territory of Arkansas;* and that for the purpose aforesaid, the residue of the Indian country west of the said Mississippi River shall be, and hereby is, annexed to the judicial district of Missouri; and for the purpose aforesaid, the several portions of Indian country east of the said Mississippi River shall be, and are hereby, severally annexed to the territory in which they are situate.

"SEC. 25. *And be it further enacted*, That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

"SEC. 26. *And be it further enacted*, That if any person who shall be charged with a violation of any of the provisions or regulations of this act shall be found within any of the United States, or either of the Territories, such offenders may be there apprehended and transported to the Territory or judicial district having jurisdiction of the same."

It will be observed that the boundaries of that part of the Indian country described in Section 24 embrace what is now known as the Indian Territory, and that was annexed for judicial purposes to the *Territory* of Arkansas. Arkansas was admitted into the Union as a State June 15, 1836 (5 Stats., 50); and it was held that after such admission the Federal courts in the *State* or District of Arkansas had no jurisdiction over offenses committed in the Indian Territory, and that special legisla-

tion was necessary to invest such courts with such jurisdiction.

> United States vs. Alberty (decided by Mr. Justice DANIEL and District Judge JOHNSON), Hemp., 444; United States vs. Tawan-ga-ca, Hemp., 304; United States vs. Starr, Hemp., 469; United States vs. Ivy, Hemp., 562.

In consequence of these decisions Congress passed the Act of June 17, 1844 (5 Stats., 680), which is as follows:

"*An act supplementary to the act entitled 'An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers,' passed thirtieth June, one thousand eight hundred and thirty-four.*

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Courts of the United States in and for the district of Arkansas, be, and they hereby are, vested with the same power and jurisdiction, to hear, try, determine and punish all crimes committed within that Indian country designated in the twenty-fourth section of the act to which this is a supplement, and therein and thereby annexed to the Territory of Arkansas, as were vested in the Courts of the United States for said Territory before the same became a State. And that for the sole purpose of carrying this act into effect, all that Indian country heretofore annexed by the said twenty-fourth section of the act aforesaid to the Territory of Arkansas, be and the same hereby is annexed to the State of Arkansas."

It thus appears that the jurisdiction of the Courts of the United States for Arkansas were expressly limited to that precise and defined region known as the Indian Territory, described by bounds in the 24th section of the above-mentioned Act of June 30, 1834, and which excludes, and by no possibility could have included, the region now known as "No Man's Land." That

region was then (A. D. 1844) part of the independent Republic of Texas.

On the 31st day of January, 1877 (19 Stats., 230), an Act was passed by Congress which contained the following provision:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That Section five hundred and thirty-three of the Revised Statutes be amended so as to read as follows: 'Sec. 533. That the State of Arkansas is divided into two districts, which shall be called the Eastern and Western Districts of Arkansas. The Western District includes the Counties of Benton, Washington, Crawford, Sebastian, Scott, Polk, Sevier, Little River, Howard, Montgomery, Yell, Logan, Franklin, Johnson, Madison, Newton, Carroll, Boone, and Marion, *and the country lying west of Missouri and Arkansas, known as the Indian Territory*. The Eastern District includes the residue of the State.'"

By this it will be seen that the Western District of Arkansas included the country "lying west of Missouri and Arkansas, known as the 'Indian Territory.' Long prior to this date, January 31, 1877, Congress had often, as we have above shown, referred to the "Indian Territory" as the region embracing the country occupied by the Indian Tribes, which did not include "No Man's Land." And the Act of January 31, 1877, *supra*, speaks of the country west of Missouri and Arkansas *known* as the Indian Territory. It was then well known, and Congress referred to it accordingly. This Act of 1877 taken *in pari materia* with the acts above mentioned, of June 30, 1834, and June 17, 1844, which for judicial purposes defines by bounds what the Indian Territory is, excludes "No Man's Land," and makes it clear that the words "Indian Territory" as used in the Act of January 31st, 1877, above quoted, meant the territory

as defined in the aforementioned acts which are *in pari materia* with the said Act of January 31, 1877, and the region occupied by the Indian tribes, and which in Acts of Congress and in geographical and other publications was described and popularly known as the Indian Territory.

On the 6th of January, 1883 (22 Stats., 400), Congress passed an Act entitled, "An Act to provide for holding a term of the District Court of the United States at Wichita, Kansas, and for other purposes." By the first section of the Act a term of the United States District Court at Wichita, Kansas, was established. Sections 2, 3 and 4 of the said Act are as follows:

"SEC. 2. That all that part of the Indian Territory lying north of the Canadian River and east of Texas and the one hundredth meridian not set apart and occupied by the Cherokee, Creek, and the Seminole Indian tribes shall, from and after the passage of this Act, be annexed to and constitute a part of the United States Judicial District of Kansas; and the United States District Courts at Wichita and Fort Scott, in the District of Kansas, shall have exclusive original jurisdiction of all offences committed within the limits of the territory hereby annexed to said District of Kansas against any of the laws of the United States now or that may hereafter be operative therein.

"Sec. 3. That all that portion of the Indian Territory not annexed to the District of Kansas by this act, and not set apart and occupied by the Cherokee, Creek, Choctaw, Chickasaw and Seminole Indian tribes, shall, from and after the passage of this act, be annexed to and constitute a part of the United States Judicial District, known as the Northern District of Texas; and the United States District Court at Graham, in said Northern District of Texas, shall have exclusive original jurisdiction of all offences committed within the limits of the territory hereby annexed to said Northern District of Texas, against any of the laws of the United States now or that may hereafter be operative therein.

"Sec. 4. That nothing contained in this act shall be construed to affect in any manner any action or proceeding now pending in the Circuit or District Court for the Western District of Arkansas, nor the execution of any process relating thereto; nor shall anything in this act be construed to give to said District Courts of Kansas and Texas, respectively, any greater jurisdiction in that part of said Indian Territory so as aforesaid annexed, respectively, to said District of Kansas and said Northern District of Texas, than might heretofore have been lawfully exercised therein by the Western District of Arkansas; nor shall anything in this act contained be construed to violate or impair in any respect any treaty provision whatever."

Taking the language of Sections 2 and 3 of the abovementioned Act by itself, it would fairly exclude "No Man's Land" and confine their operation to the Indian Territory proper; that is to say, Section 2 annexes that part of the Indian Territory lying north of the Canadian River and east of Texas and the one hundredth meridian to the District of Kansas; and that part of the Indian Territory not thus annexed to the District of Kansas was by the third section annexed to the *Northern* District of Texas. And the language of the fourth section of the Act clearly shows that "No Man's Land" was not included in the words the "Indian Territory," as used in said act:

"Nor shall anything in this act be construed to give to said district courts of Kansas and Texas, respectively, any greater jurisdiction in that part of said Indian Territory so as aforesaid annexed, respectively, to said District of Kansas and said Northern District of Texas than might heretofore have been lawfully exercised therein by the Western District of Arkansas."

This Act of 1883 also uses the words not "Indian country" but "Indian Territory," and it uses them in the same sense in which they were used in the previous

Act of January 31, 1877, above noticed. The words "Indian Territory" are not elastic. They mean a fixed and known region. The object of the Act of January 6, 1883, was to take away from the Western District of Arkansas the jurisdiction over the "Indian Territory" conferred upon it by the Act of January 31, 1877, and to partition, *without territorial enlargement*, that jurisdiction between Kansas and the Northern District of Texas.

Congress, by the previous Act of February 24, 1879 20 Stats., 318), had created the Northern Judicial District of Texas, the Eastern Judicial District of Texas and the Western Judicial District of Texas, and fixed the times and places for holding Courts therein. By this Act the Counties of Fannin, Lamar and Delta (among others) were in the Northern District, the County of Red River in the Eastern District of Texas. No jurisdiction was given by this Act to either of said Courts over the Indian Territory or No Man's Land.

On March 1, 1889 (25 Stats., 783), Congress passed an Act entitled "An Act to establish a United States Court in the Indian Territory, and for other purposes."

Section 1 provides:

"That a United States Court is hereby established, whose jurisdiction shall extend over the Indian Territory, bounded as follows, to wit: North by the State of Kansas, east by the States of Missouri and Arkansas, south by the State of Texas, and west by the State of Texas and the Territory of New Mexico; and a Judge shall be appointed for said Court by the President of the United States."

Section 5 is as follows:

"SEC. 5. That the Court hereby established shall have exclusive original jurisdiction over all offenses

against the laws of the United States committed within the Indian Territory, as in this act defined, not punishable by death or by imprisonment at hard labor."

Sections 17 and 18 are as follows:

"SEC. 17. That the Chickasaw Nation and the portion of the Choctaw Nation within the following boundaries, to wit: Beginning on Red River at the southeast corner of the Choctaw Nation; thence north with the boundary line between the said Choctaw Nation and the State of Arkansas to a point where Big Creek, a tributary of the Black Fork of the Kimishi River, crosses the said boundary line; thence westerly with Big Creek and the said Black Fork to the junction of the said Black Fork with Buffalo Creek; thence northwesterly with said Buffalo Creek to a point where the same is crossed by the old military road from Fort Smith, Arkansas, to Boggy Depot, in the Choctaw Nation; thence southwesterly with the said road to where the same crosses Perryville Creek; thence northwesterly up said creek to where the same is crossed by the Missouri, Kansas and Texas Railway track; thence northerly up the centre of the main track of the said road to the South Canadian River; thence up the centre of the main channel of the said river to the western boundary line of the Chickasaw Nation, the same being the northwest corner of the said nation; thence south on the boundary line between the said nation and the reservation of the Wichita Indians; thence continuing south with the boundary line between the said Chickasaw Nation and the reservations of the Kiowa, Comanche and Apache Indians to Red River; thence down said river to the place of beginning; and all that portion of the Indian Territory not annexed to the District of Kansas by the act approved January sixth, eighteen hundred and eighty-three, and not set apart and occupied by the five civilized tribes, shall, from and after the passage of this act, be annexed to and constitute a part of the Eastern Judicial District of the State of Texas, for judicial purposes.

"SEC. 18. That the Counties of Lamar, Fannin, Red River and Delta, of the State of Texas, and all that part of the Indian Territory attached to the said Eastern Judicial District of the State of Texas by the

provisions of this act, shall constitute a division of the Eastern Judicial District of Texas; and the terms of the Circuit and District courts of the United States for the said Eastern District of the State of Texas shall be held twice in each year, at the City of Paris, on the third Mondays in April and the second Mondays in October; and the United States Courts herein provided to be held at Paris shall have exclusive original jurisdiction of all offenses committed against the laws of the United States within the limits of that portion of the Indian Territory attached to the Eastern Judicial District of the State of Texas by the provisions of this act, of which jurisdiction is not given by this act to the court herein established in the Indian Territory; and all civil process issued against persons resident in the said Counties of Lamar, Fannin, Red River and Delta, cognizable before the United States Courts, shall be made returnable to the Courts, respectively, to be held at the City of Paris, Texas;

And all prosecutions for offenses committed in either of said last mentioned counties shall be tried in the division of said Eastern District of which said counties form a part: *Provided*, That no process issued or prosecution commenced or suit instituted before the passage of this act shall be in any way affected by the provisions thereof."

EFFECT OF THE FOREGOING LEGISLATION UPON THE QUESTION OF JURISDICTION.

On this legislation we submit that it is entirely clear that the allegations in the indictment that the Neutral Strip or "No Man's Land" was, on July 25, 1888 (the date of the homicide), in the "Indian Territory," and that the same was attached to and constituted part of the *Eastern* Judicial District of Texas, are, and each of those allegations is, wholly without foundation. On the contrary, it appears from the foregoing legislation that on the 25th of July, 1888, "No Man's Land" was no part of the Indian Territory, and was not at that time situate in or annexed to *any* judicial district of the

United States. It was not part of the Indian Territory, or part of the Indian Country, as it stood annexed by the Acts of 1834 and 1844, noticed above, to the District of Arkansas, and it was no part of the "Indian Territory," as it was by the Act of January 31, 1877, annexed by the then well-known name, "Indian Territory," to the Western District of Arkansas; it was not part of the "Indian Territory" within the meaning of the Act of January 6, 1883, (quoted *ante* p. 14), which divided the jurisdiction over the Indian Territory between Kansas and the *Northern* District of Texas. The result is, that it was not on July 25, 1888, the date of the alleged homicide, part of any judicial district. If this be so, the conclusion necessarily follows that the Circuit Court for the Eastern District of Texas (which is sufficient for the purposes of this case) had no jurisdiction.

It is important, however, to the defendants, even if the judgment shall be reversed on this ground, that this Court should in that event determine whether any Federal Court had jurisdiction of the offense charged in the indictment.

OUR PROPOSITION IS THAT NO FEDERAL COURT HAS JURISDICTION.

The Constitution of the United States provides (Section 2 of Article III., quoted at large, *infra*, p. 30) that when crimes are not committed within any State "the trial shall be at such place or places as the Congress may by law have directed." This means, as will be hereafter shown, especially in view of Article VI. of the Amendments, that the place or places of trial must have been directed by Congress by statute

prior to the commission of the offense, and not simply prior to the commencement of the prosecution.

In the Crimes Act of April 30, 1790, Chapter IX., Sec. 8 (1 Stats., 112), Section 8 is as follows:

"Sec. 8. *And be it* [*further*] *enacted*, That if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State, murder or robbery, or any other offense which, if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such a ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defense of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; *and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought.*"

The Amendment of March 3, 1825, of the Crimes Act (4 Stats., 115, 118) contains numerous provisions in regard to offenses within forts, dock yards, &c., and murder upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State. Section 14 is as follows:

"Sec. 14. *And be it further enacted*, That if any person, upon his or her arraignment upon any indictment before any Court of the United States for any

offense not capital shall stand mute, or will not answer or plead to such indictment, the Court shall, notwithstanding, proceed to the trial of the person so standing mute, or refusing to answer or plead, as if he or she had pleaded not guilty, and upon a verdict being returned by the jury, may proceed to render judgment accordingly. *And the trial of all offenses which shall be committed upon the high seas or elsewhere, out of the limits of any State or district, shall be in the district where the offender is apprehended, or into which he may be first brought.*"

The provision as it stands in the Revised Statutes is as follows:

"SEC. 730. The trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought."

It has been held that this referred only to maritime offenses, and not to offenses committed upon land.

United States vs. Alberty, Hemp., 444, per DANIEL and JOHNSON, Justices.

In *ex parte* Bollman and *ex parte* Swartwout, 4 Cranch, 75 (1807), it was held that if an offense be committed on land the offender must be tried by the Court having jurisdiction over the territory where the offense was committed. In this case Bollman and Swartwout had been arrested by the military authorities in the territory of Orleans, and were committed by the Circuit Court of the District of Columbia, on a charge of treason against the United States, alleged to be committed off somewhere on the Ohio or the Mississippi, or in the territory of Orleans. They were discharged. The above quoted Section 8 of the Act of April 30,

1790, was referred to by the prosecution. On this subject Chief-Justice MARSHALL said (page 136):

"The law read on the part of the prosecution is understood to apply only to offenses committed on the high seas, or in any river, haven, basin or bay, not within the jurisdiction of any particular State."

Again, Sections 1 and 26 of the Act of June 30, 1834 (quoted *ante*, p. 10) show that Congress considered *all* offenses in the Indian Country to be within the *territorial* jurisdiction of some Court (which jurisdiction it defined), and that offenders when arrested elsewhere were to be transported for trial to the Court having territorial jurisdiction—a provision absolutely inconsistent with the application of Section 730 to such offenses.

We therefore submit that "No Man's Land" was on July 25, 1888, the date of the alleged homicide, no part of any judicial district, and that Congress had not previously to that time prescribed any place for the trial of offenses committed within that region; and under the Constitution Congress could not, if it had undertaken to do so (which it did not), afterwards prescribe a place of trial, for such act would not only be in conflict with Section 2, Article III., of the Constitution, above referred to, but would also be *ex post facto* within the meaning of the Constitution, as is shown by the decision and reasoning in *Kring vs. Missouri*, 107 U. S., 221. In that case it was held that the distinction between retrospective laws which relate to the remedy or the mode of procedure, and those which operate directly on the offense, is unsound where in the latter case they injuriously affect any substantial right to which the accused was entitled

under the law as it existed when the alleged offense was committed, and also that within the meaning of the Constitution any law is *ex post facto* which is enacted after the offense was committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage (see also *Re* Murphy, 1 Woolworth, 141).

But if we are mistaken in this, and if Section 730 of the Revised Statutes does apply to offenses committed *on land*, outside of any particular State or district, then the distinct provision is that the trial "shall be in the district where the offender is found, or into which he is first brought;" and that fact ought to be alleged in the indictment; certainly in some proper mode to appear of record. Such allegation in the indictment would seem to be necessary in order to show that the crime is within the limited jurisdiction of the particular Federal Court. As before stated, the indictment alleges the ground of jurisdiction to be "that the offense was committed within the [territorial] jurisdiction of the Court." It would not be competent for the prosecutor to show that the allegations of the indictment in this respect were false, and to claim "No Man's Land" was outside of the jurisdiction of any Court, and that Section 730 of the Revised Statutes applies. But if it did apply, the Court having jurisdiction would be the Court of the district where the offender was found or into which he was first brought. There is nothing in the record to show that the Eastern District of Texas is such Court. In point of fact, the defendants were residents of and were arrested in the District of Kansas, and applied to his Honor Judge BREWER on *habeas corpus* to be released. The case is entitled *In re* Jack-

son, reported in 40 Fed. Rep., 372. His Honor's opinion commences as follows:

"BREWER, C. J.: In the case *ex parte Jackson* the facts are these: The petitioner was indicted by the Federal Court of the Eastern District of Texas for the crime of murder, committed in the year 1888, in the district known as 'No Man's Land.' He was arrested in this State and a removal is sought to the Texas District. To prevent that, this petition in *habeas corpus* has been filed, and the question presented is as to the jurisdiction of the Texas Court over the territory and the offense and the duty of this Court on *habeas corpus*."

We have thus far considered the question of jurisdiction on the hypothesis that "No Man's Land" was on July 25, 1888 (the date of the homicide) not within any judicial district, and that if this be so, either there was no provision of law giving any Federal Court jurisdiction, or, if any, it was the district in which the defendants were found or arrested—in this case the District of Kansas. But if we are mistaken in the position that "No Man's Land" did not belong July 25, 1888, to any judicial district, then it belonged, if to any, to the *Northern* District of Texas by virtue of the Act of January 6, 1883 (22 Stats., 400), above quoted.

The result would be that the *Eastern* District of Texas would have no jurisdiction; and confessedly it has none, except it is conferred by the eighteenth section of the Act of March 1, 1889 (25 Stats., 783), above quoted (*ante*, p. 17), which was passed *after* the date of the alleged homicide.

ACT OF MARCH 1, 1889, DOES NOT APPLY TO PAST OFFENCES.

Now, nothing seems to us to be plainer than that the Act of 1889 does not undertake to give any jurisdiction to the Circuit Court for the Eastern District of Texas as to *past* offenses. The only language relating to jurisdiction is the following:

"And the United States Courts herein provided to be held at Paris shall have exclusive original jurisdiction of all offenses against the laws of the United States within the limits of that portion of the Indian Territory attached to the Eastern Judicial District of the State of Texas by the provisions of this act," &c.

There is no reason to suppose that Congress in the use of the words that the "Court herein provided to be held at Paris shall have exclusive original jurisdiction of all offenses against the laws of the United States," meant to refer to past offenses. There is not the slightest evidence or indication of any such intention to be found in the Act. The ordinary principles of construction apply, namely, that a statute shall have a prospective operation only, unless in clear terms it is given a retrospective operation.

It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively.

Cooley's Const. Lim. (marginal) 370, and numerous cases cited in the note.

"But we may affirm, as a general rule, that, with the exception of those cases outside of the true limits of the law-making power, of those cases growing out of the

restrictions of the Federal Constitution, and, excepting also, where, as in New Hampshire, the States themselves have adopted a positive prohibition, it is in this country considered competent for the State Legislature to pass laws having a retrospective effect; the only judicial check on the power being that the courts refuse to give statutes a retroactive construction unless *the intention is so clear and positive as by no possibility* to admit of any other construction. But, on the other hand, *it is equally true that they are greatly discountenanced, and that the desire and effort of the courts is always to give a statute a prospective operation only.*"

Sedgwick Stat. and Con. Law, 2d Ed., p, 166.

Again, "but that such laws are, as a general rules, objectionable in principle and unjust in practice, and that the judiciary will give all laws a prospective operation only, unless their language is so clear as not to be susceptible of any other constructions. Nothing short of a great, paramount necessity can justify laws of this kind" (Same, p. 173).

In England the doctrine is that "statutes are to be held prospective only, unless there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively" (Same, p. 164). Such legislation, if construed to be retroactive, might put a man on trial for an offense years after its commission, after the witnesses had been lost by death or removal.

THE SETTLED DOCTRINE OF THIS COURT is that statutes are not to be construed to have a retrospective operation. In *Chew Heong vs. United States*, 112 U. S., 536, Mr. Justice HARLAN, giving the opinion of the Court, said (p. 559):

"The courts uniformly refuse to give the statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no

room to doubt that such was the intention of the Legislature. In *United States vs. Heth*, 3 Cranch, 398, 413, this Court said that 'words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied;' and such is the settled doctrine of this Court" (citing cases).

The case of the U. S. vs. Starr. Hempstead, 469, is in point, and was, we think, well decided. The facts were these:

By Act of Congress of June 30th, 1834, referred to *ante* (4 Stat., 733), jurisdiction over the Indian Country west of Arkansas was vested in the Territorial Court in all criminal cases except where both the offending party and the person injured by his crime were Indians. On June 15th, 1836, the Territory of Arkansas became a State (5 Stat., 50), and on March 3d, 1837, the United States Circuit Court for the District of Arkansas was created "with like jurisdiction as other Circuit Courts of the United States." On June 17th, 1844 (5 Stat., 680), an act was passed granting the Circuit Court for the District of Arkansas the same jurisdiction as had been formerly exercised by the Territorial Court over the Indian Country. For text of this act see *ante* (p. 12).

Prior to this "Supplemental Act" and *after* the Territory had become a State, defendant committed murder in the Indian Country. The question in the Circuit Court was whether it had jurisdiction of the crime, and it was held by JOHNSON, J., that there was no jurisdiction, because the Court never had jurisdistion over offenses committed in the Indian Country until such jurisdiction was expressly conferred by the "Supple-

mental Act" of 1844, and that act did not extend to past offenses. Said the Court (p. 469):

At a previous term, in the case of the *United States vs. Alberty*, we held that this Court possessed no jurisdiction beyond the limits of the State of Arkansas, and consequently had no power or authority to hear, try and punish offenses committed in the Indian country."

He then recites the subsequent passage of the said Act of June 17, 1844, and the commission of the crime before its passage, and then continues (p. 471):

"The crime charged against the prisoner, as stated, was committed when neither this nor any other Court of the United States was clothed with jurisdiction and power to try and punish it, and to proceed to do so now would be to give the act in question a retroactive effect."

He calls attention to strict construction of penal statutes, and concludes:

"The inquiry then is: Has Congress, by the terms used in the Act of the 17th of June, 1844, giving this Court jurisdiction, clearly expressed the intention that it shall take cognizance of *past* as well as future crimes? Let us examine the words of the statute itself (see text thereof, *ante*, p. 12). It provides that the Court shall have the same power and jurisdiction of these offenses that were vested in the Courts of the United States for the Territory of Arkansas before the same became a State. And for the sole purpose of carrying the act into effect, all that Indian country heretofore annexed to the Territory of Arkansas is hereby annexed to the State of Arkansas. By this act nothing beyond jurisdiction of crimes committed in the Indian country is conferred on this Court, and, in order to make the grant effectual, the Indian country is attached to this judicial district, and constitutes a part of it. This is all. There is nothing from which an inference can be drawn that it was intended by its makers to have a retrospective operation. They have neither said so expressly, nor have they intimated that it shall have that

effect. In the absence of any express intention to the contrary, the Court is bound to presume that the makers of the law intended it to operate upon the future, and not upon the past. If Congress had made it retrospective, a nice question would then have been presented, upon which I give no positive opinion, although my mind inclines to the belief, for reasons that need not now be stated, that if there is no tribunal competent at the time to punish an offense, the jurisdiction cannot be afterwards conferred. For these reasons the prisoner must be discharged" (S. P. United States vs. Ivy, Hemp., 562).

It was ruled, and rightly, that there was nothing in the language of the Act of 1844, which is like that of 1889, with which we are concerned, to show that Congress meant that it should have a retrospective operation.*

Such a construction of the Act of 1889 would encounter two distinct constitutional objections; one of which is peculiar to Federal jurisprudence, and the other common to Federal and State jurisprudence:

1st. That it would violate Sec. 2, Art. 3, of the Constitution, which requires the district to be fixed by law *prior to the commission of the offense.*

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* "The doctrine is fundamental in English and American law, that there can be no constructive offences: *that before a man can be punished his case must be plainly and unmistakably within the statute, and if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused.* These principles of law admit of no dispute, and have often been declared by the highest Courts, and by no tribunal more clearly than the Supreme Court of the United States (*United States vs. Morris*, 14 Pet., 464, *United States vs. Wiltberger*, 5 Wheat., 76, *United States vs. Sheldon*, 2 Wheat., 119. And see also, *Ferrett vs. Atwell*, 1 Blatchf., 151, 156; Sedgw. Const. and St. Law, 324, 326, 334; 1 Bish. Cr. Law, Secs. 134, 145)."

United States vs. Clayton, 2 Dillon, 219, 226, DILLON and CALDWELL, JJ.

2d. It would be an *ex post facto* statute, and for that reason void.

These questions as to the constitutional power of Congress we will consider under the following proposition:

But if the Act of March 1, 1889 (25 Stats., 783, which is the only Act on which the supposed jurisdiction of the Circuit Court for the Eastern District of Texas rests), shall be construed to be retrospective, and to have been intended to apply to offenses committed in "No Man's Land" prior to the passsge of that Act, the said Act is void because in conflict with Section 2, Art. 3, of the Constitution, for the reason that Congress had no power to fix or change the District in which the trial should be had after the commission of the offense.

Section 2 of Article III. of the Constitution is as follows:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

This section provides that in the States crimes shall be prosecuted within the States where committed, and when the crime is committed without the States the

trial shall be at such place or places as the Congress may by law *have directed.*

When introduced the last clause read as follows: "As the legislature *may* direct." It was changed so as to read "as the Congress *may by law have directed*" (Madison Papers, Vol. 5, p. 48), which plainly means that such direction must be by a Statute passed before the commission of the offense. By deliberate choice of words the power to pass retrospective statutes on a point justly deemed so essential to the liberty of the citizen was purposely taken away from Congress.

This section was further supplemented by the Sixth Amendment to the Constitution, which provides:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

The object of these provisions is plain. It was intended to secure to the accused a trial by jury in the place where the crime was committed. If Congress might fix the place of trial after the commission of an offense it could provide for trial in a district remote from the residence of the accused, at such a distance from the witnesses as to deprive him of their presence and testimony. All such attempts are rendered void by the constitutional provisions above quoted.

It was expressly decided by the United States Circuit Court for the Eastern District of New York, United States vs. Maxon, 5 Blatchf., 360 (NELSON and BENEDICT, JJ.), that under the Sixth Amendment to the Constitution above quoted, the district in which the trial is had must have been ascertained *previously*

to the commission of the crime and not merely previously to the trial; and, therefore, where a larceny was committed in the Navy Yard of Brooklyn when it was within the *Southern* District of New York, but which Navy Yard was included in the *Eastern* District of New York, as defined and organized by an act passed *after* the commission of the offense and before the finding of the indictment, the indictment found in the Eastern District was quashed.

After quoting the Sixth Amendment, NELSON, J., says:

"The argument in support of the jurisdiction (of the Eastern District of New York) is, that if the district is ascertained by law before the trial the amendment is sufficiently complied with. We think that this interpretation is not in accordance with the fair import of the terms of the provisions; nor would it meet the grievance it was intended to remedy, namely, the formation of a district after the offense was committted to suit the will or caprice of the law-making power."

The same reasons apply to the second Section of the third Article. The language in that article, "at such place or places as the Congress may by law have directed," is substantially the same as the language of the Sixth Amendment, which gives the accused "the right to an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

Neither in the reason of the thing nor in the language can any distinction be drawn in this respect between the original provisions and the provisions of the amendment. Both were designed to meet the same evil and to afford the same protection.

Any other construction would deprive the accused of his constitutional right to trial by jury of the vicinage. Such trial, by the people of the vicinage where the accused is known, and where he can have the benefit of his character and acquaintances and of the knowledge which the jury may have of the witnesses appearing against him is an essential incident of the common law trial by jury.

Cooley's Const. Lim., 320 (Marginal).

Mr. Justice STORY thus comments upon 2d Section of Art. III. of the Constitution, its meaning, policy and purpose :

"It is observable, that the trial of all crimes is not only to be by jury, but to be held in the State where they are committed. The object of this clause is to secure the party from being dragged to a trial in some distant State away from his friends and witnesses and neighborhood, and thus to be subjected to the verdict of mere strangers who may feel no common sympathy, or who may even cherish animosities or prejudices against him. Besides this, a trial in a distant State or Territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring witnesses to establish his innocence. There is little danger, indeed, that Congress would ever exert their power in such an oppressive and unjustifiable manner. But upon a subject so vital to the security of the citizen, it was fit to leave as little as possible to mere discretion. By the common law the trial of all crimes is required to be in the county where they are committed; nay, it originally carried its jealousy still farther, and required that the jury itself should come from the vicinage of the place where the crime was committed. It was doubtless by analogy to the rule of the common law, that all criminal trials are required to be in the State where committed.

"But, as crimes may be committed on the high seas and elsewhere, out of the territorial jurisdiction of a State, it was indispensable that in such cases Congress

should be enabled to provide the place of trial" (Story on the Constitution, Vol. 2, pages 528, 529, Sec. 1781).

The same views are expressed by Mr. Justice FIELD, in the case of Gut vs. The State, 9 Wallace, 35, 37, in these words:

"Undoubtedly the provision securing to the accused a public trial in the county or district in which the offense is committed is of the highest importance. It prevents the possibility of sending him for trial to a remote district, at a distance from friends, among strangers, and perhaps parties animated by prejudices of a personal or partisan character; but its enforcement in cases arising under State laws is not a matter within the jurisdiction of the Federal Courts."

A case more strikingly exhibiting the value of this constitutional guaranty than the facts in the case at bar could not well be imagined. Here citizens of Kansas were taken a distance of eight hundred miles from their homes to be tried by a jury of strangers where they are unknown and where the character of the witnesses called for the Government was wholly unknown to the jury. If the limitations of the sixth amendment apply only to crimes committed within the States (United States vs. Dawson, 15 How., 467), then the provisions of Section 2 of Article 3 must control in the present case, which limits the right of trial to such place or places as the Congress may by law have directed previously to the commission of the offense.

The reasons for requiring the place of trial to be fixed before the commission of the offense, where an act has been done outside of State lines, are equally cogent with those applicable to crimes committed within the States. If this be not so then these offenses might as well have been made triable in Maine as in Texas. In

fact, the place of trial in Texas is more than eight hundred miles from the scene of the offense charged. The defendants were taken to prison at a place so remote from the place of the homicide and from their friends and witnesses, among strangers, that thorough preparation or presentation of their defense was practically impossible. The jury of the "vicinage" was selected from strangers living from eight hundred to a thousand miles from the place where the alleged offense was committed. The history of the constitutional provisions above referred to, the jealous care with which the rights of the citizen were guarded, the fear of a repetition of the evils of which the colonists complained in trials for alleged crimes "beyond seas" and at places remote from their homes, the hardship of such a course, the resulting deprivation of trial by jury in some of its essential elements, all lead to the conclusion that it never was intended to confer on Congress the arbitrary power to fix the place of trial after the commission of the offense. Such was the opinion expressed in the late case of

Devoe Manufacturing Company, 108 U. S., 417.

Mr. Justice BLATCHFORD, delivering the opinion of the Court, says:

"Of course, the district as a place of trial must be ascertained by law before the crime is committed, and a person charged with a crime cannot be tried for it in a district which did not include, when the crime was committed, the place where it was committed."

No more, we submit, can a person be tried for a crime at a place prescribed for the first time by a law passed after the crime is committed, whish is this case.

The words in the Sixth Amendment to the Constitution of the United States, "which district shall previously have been ascertained by law," have no greater force to show that the district should have thus been ascertained by law before the offense was committed, instead of merely before the prosecution was commenced, than do the words "shall be at such place as the Congress may by law have directed" in Article III., Sec. 2.

We therefore conclude:

(*a*) If No Man's Land was not at the date of the alleged homicide within any judicial district the defendant cannot, under the Constitution, be tried for that offense in a district thereafter created. "Of course," says Mr. Justice BLATCHFORD, "this is so."

Devoe Mfg. Co. Case, *supra*.

It is immaterial, on this point, whether the offense was committed within a State or at some place within the exclusive jurisdiction of the United States. In all cases the district or place of trial must, under the Constitution, be prescribed by law prior to the commission of the offense.

(*b*) If No Man's Land was, at the date of the alleged homicide, within any judicial district, it was the *Northern* District of Texas and not the *Eastern* District, and there is nothing in the Act of March 1st, 1889 (25 Stats., 783), giving the Circuit Court for the Eastern District jurisdiction over capital offenses in the Indian Territory which purports either to be retroactive or to displace the jurisdiction of the Northern District of Texas as to offenses which were previously committed therein.

That Congress has no such power, see
United State vs. Maxon, *supra*.
Devoe Manuf. Co. Case, *supra*, and authorities cited above.

INDICTMENT FATALLY DEFECTIVE.

II.

The indictment is fatally defective in that it does not allege when the deceased, John M. Cross, died, or that he died within a year and a day of the infliction of a mortal wound, or that he died from the effect of said wound, or that he died within territory in the jurisdiction of the Court in which plaintiffs in error were tried.

This objection necessarily arises on the record. It was specifically taken, however, by the motion in arrest of judgment.

THE INDICTMENT sets forth that the defendants "did unlawfully, feloniously, and with their malice aforethought, and the malice aforethought of each of them, and with certain deadly weapons, to wit, certain guns and pistols, the same being then and there loaded and charged with gunpowder and leaden balls, said deadly weapons being then and there held in the hands of the persons aforesaid, make an assault in and upon the body of John M. Cross, and did then and there shoot off the contents of said guns and pistols at, in and upon and against the body of the said John M. Cross, inflicting thereon two mortal wounds; the said John M. Cross then and there did languish, and languishing did die. And so the grand jurors do present and say," &c.

1. This is all of the indictment descriptive of the

manner, time and place of the death of Cross. It is, we submit, fatally defective in several particulars. There is no allegation that the said Cross *died within a year and a day*. This is an essential ingredient of every indictment for criminal homicide. Upon this point there is uniformity of statement in all the elementary writers, and in all the decisions of the courts.

"DEATH MUST APPEAR TO HAVE BEEN WITHIN A YEAR AND A DAY OF THE WOUND.—Thus an indictment, upon which it does not appear that the death happened within a year and a day after the wound was given, is fatally defective; because, when the death does not ensue within a year and a day after the wound is inflicted, the law presumes that it proceeded from some other cause. The date of the death, therefore, as well as that of the stroke, must distinctly appear."

Wharton on Homicide, Second Edition, Section 845.

"LIMIT AS TO TIME—(YEAR AND DAY).—In law, the killing is felonious only when the death takes place within a year and a day after the stroke. And that it did so must appear from the date or respective dates set down in the allegation, otherwise the indictment will be ill."

2 Bishop on Cr. Pro., Third Edition, Sec. 533.
1 Wharton Prec., Indictments and Pleas, p. 114.
1 Wharton Crim. Law, Ninth Edition, Sec. 537.
State vs. Baker, 1 Jones N. C., 267.
State vs. Blan, 69 Mo., 317.
Edmundson vs. State, 41 Texas, 496.
State vs. Shepard, 8 Ire., 195.

PLACE OF DEATH.—This indictment also fails to allege the *place of death*. It is not charged to have taken place within the jurisdiction of the Court. That this is an essential averment we refer to 1 Wharton Crim. Law, Ninth Edition, Section 538.

"PLACE MUST BE AVERRED.—The indictment at common law should also aver that the deceased died in the county in which the indictment is found.

"Where the stroke was at one time or place, and the death at another, if the day be especially alleged, it should be that on which the party died, and not that on which he was stricken; for until he died it was no murder."

Wharton on Homicide, Second Edition, Sec. 846.

The charge that Cross did then and there languish, and languishing did die, does not charge that he then and there died.

"A charge that A, on such a day, at, &c., made an assault upon B, and him with a knife feloniously struck, killed and murdered, was held not to import sufficiently that the stroke was at the same time and place as the assault for want of the words 'then and there.'"

1 Russell on Crimes, 2d Am. Ed., marg. p. 470.

1 Wharton Cr. Law, Sixth Edition, Section 272.

1 Bishop's Crim. Pro., Third Edition, Section 407–8 *et seq.*, Section 413.

As to the time of death, it may be added that the words the "said John M. Cross did then and there languish, and languishing did die" in themselves import some lapse of time after the reception of the mortal wound, before death occurred. The words "then and there," as employed in the sentence, refer to the time of the infliction of the mortal wound, and of the beginning of the process of languishing, but not the duration of that process, or the time of death. To languish, according to Webster, means "to become languid or weak, to sink away; to lose strength or animation; to be or become dull, weak, or spiritless; to pine, to be or to grow heavy." How long Cross

languished, after receiving the mortal wound, whether for a longer or shorter period than a year and a day, before he died, in no manner appears. Even if the language had been, "and languishing did immediately die," or "and languishing did instantly die," the allegation would have been insufficient.

1 Wharton Crim. Law, Sixth Edition, Sec. 272.

1 Bishop Crim. Pro., Third Edition, Sec. 409.

Lester vs. State, 9 Mo., 658.

A fortiori the allegation is insufficient if the word immediately is used to modify the word "languish" and not the word "die."

State vs. Sides, 64 Mo., 383, is a case exactly in point. The Court said (p. 385):

"In the case at bar the indictment only charges that the deceased 'did immediately languish, and languishing, did die.' The allegation fails to show when and where he died."

The indictment was, therefore, held bad.

2 Hale P. C., 179.

2 Bishop Crim. Proc., § 533, and cases cited.

But the allegation in the present indictment is still more indefinite and is insufficient.

2. There is, also, an entire *failure to aver any connection between the assault or mortal wounds and the death of Cross*: two mortal wounds are charged, and after a semicolon is the statement "the said John M. Cross then and there did languish, and languishing, did die." It is not even stated that said Cross languished of the mortal wounds; it is not charged that he died of them. For aught here charged the deceased may have

died of other violence or intervening disease. From the earliest writers of the common law to the present day no precedent of an indictment for murder can be found that does not distinctly and clearly charge the death to have resulted from the wounds inflicted. It must be averred that the wound or bruise was mortal, and finally the adequacy of the means to produce death must be further shown by a direct averment that the party died of the stroke, and this cannot be supplied by any implication or intendment whatsoever.

1 Starkie Cr. Pl. 93.

In all cases the death by the means stated must be positively alleged and cannot be taken by implication, and therefore when the means of death is alleged to be by any stroke, the indictment should proceed to aver that the prisoner thereby gave to the deceased a mortal wound, whereof he died.

1 East P. C., 342.

To the same effect are 1 Arch. Cr. Pr. & Pl. (Pomeroy's Edition) page 791:

"It is necessary, in all cases, that the death by the means stated should be positively alleged, for it cannot be taken by implication; if, therefore, it be stated that the death was caused by any stroke, the indictment should proceed to aver that the prisoner thereby gave to the deceased a mortal wound or bruise, whereof he died; and an indictment setting forth that the prisoner choked the deceased *qua suffocatione obiit*, instead of *de qua suffocatione*, etc., was adjudged to be erroneous."

Anon. 1 Roll. Rep., 137.
Hawk. P. C., bk. 2, c. 23, Sec. 83.
3 Chit. Crim. Law, 736.
4 British Cr. Cases, top page, 298.

The decisions of this Court are equally clear and pointed.

In United States vs. Cruikshank, 92 U. S., 542, Chief-Justice WAITE delivering the majority opinion (p. 556), said:

> "We may suspect that race was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offense, and cannot be supplied by implication. Everything essential must be charged positively, and not inferentially. The defect here is not in form, but in substance."

Mr. Justice CLIFFORD in the dissenting opinion is equally emphatic as to the necessity of clear and positive statements of all the elements of the offense, dissenting opinion, pp. 566–568. It seems to us that the doctrine of Cruikshank's case is decisive of the fate of this indictment. It may be inferred from the charge that Cross died of the mortal wounds inflicted; implication may close the gap between the mortal wound and the resulting death, and connect one with the other. One with a mortal wound may not die of it—other violence may intervene or disease may cause the death.

One mortally wounded by a dagger-thrust from one, may be dispatched by the pistol shot of another. In such case the latter only could be held for murder. The other elements of murder in the highest degree may concur in the case of the first assailant, yet his stroke did not produce the death. It needs no argument to enforce the proposition that death by the means charged is an essential element of criminal homicide. It is of the substance of the offense, and therefore cannot be supplied by implication.

ANOTHER TEST of the validity of an indictment is this:

"If the indictment may be true, and still the accused may not be guilty of the offense described in the statute, the indictment is insufficient."

Com. vs. Young, 15 Grat. 664: quoted with appropation by PAUL, J., 32 Fed. Rep., 694.
U. S. vs. McCormick, 1 Cranch. C. C., 593.
12 Myer's Fed. Decisions, Sec. 2078.

In the present case the indictment may be true and the accused not guilty of murder. Cross may have been mortally wounded; he may have languished and died, but not of the mortal wounds inflicted.

The decisions of this Court are uniform in doctrine with Cruikshank's case.

United States vs. Carll, 105 U. S., 611.
United States vs. Simmons, 96 U. S., 360.
United States vs. Hess, 124 U. S., 483.

"The Constitution," says FIELD J., "in its sixth amendment, strikes with nullity all such vague accusations as are embraced in this indictment. It declares, repeating in this respect the doctrine of the common law, that, in all criminal prosecutions, the accused shall 'be informed of the nature and cause of the accusation' against him; and this means that all the essential ingredients of the offence charged must be stated, embracing, with reasonable certainty, the particulars of time, place, and person or property. It is only by such information that the accused will be enabled to prepare his defense, and avail himself of his acquittal or conviction against any further prosecution for the same cause. 'This principle,' says Bishop in his treatise, 'that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted, pervades the entire system of the adjudged law of criminal procedure. It is not made apparent to our understandings by a single case only, but by all the cases. Wherever we move in this department of our juris-

prudence, we come in contact with it. We can no more escape from it than from the atmosphere which surrounds us.' Sec. 81. To the same effect is the language of Archbold, in his teatise on Criminal Practice and Pleading. 'The indictment,' he says, 'must state all the facts and circumstances comprised in the definition of the offense, by the rule of the common law or statute on which the indictment is founded. And these must be stated with clearness and certainty, otherwise the indictment will be bad." And he states that the principle rule as to the certainty required in an indictment may be laid down thus: That where the definition of an offense, whether by a rule of the common law or by statute, includes generic terms (as it necessarily must), it is not sufficient that the indictment should charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars (p. 88). This doctrine is fully stated and illustrated in the Cruikshank case, both in the prevailing and dissenting opinion (92 U. S., 558, 568)."

Mr. Justice FIELD in *Ex parte* Virginia, 100 U. S., 352.

"The rule," says CLIFFORD, J., in U. S. vs. Crook, 17 Wallace, 174, "is universal, that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested or reversed on error."

Edmunson vs. State, 41 Texas R., 496.
The State vs. Blan, 69 Mo., 317, 322.
People vs. Wallace, 9 Cal., 30.
People vs. Lloyd, 9 Cal., 54.

It is equally well settled that the defect being matter of substance and not of "form only," is *not cured by verdict*, and advantage may be taken of the omission by motion in arrest of judgment.

Cruikshank's Case above cited.
United States vs. Carl, 105 U. S., 611.
United States vs. Hess, 124 U. S., 483.

In the latter case it was expressly held that such defects are matter of substance, and not of "form only" within the provision of Sec. 1025 Rev. Stats., U. S. In this case the essentials of a good indictment are thus clearly stated by Mr. Justice FIELD:

"The general, and, with few exceptions, of which the present is not one, the universal rule, on this subject, is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital."

Certainly an indictment for murder is not one of the "exceptions" in which Courts have shown a disposition to relax the rules of strictness in criminal proceedings. In criminal cases courts of law are not at liberty to make intendments and inferences to support indictments in the same manner as they may do to support civil actions.

STORY, J., United States vs. Davis, 5 Mason, 356, 361.

Such defects are not aided or cured by verdict.

United States vs. Slenker, 32 Fed. Rep., 691.

United States vs. Conant, 9 Cent. Law J., 129.

The want of specific material allegations is not aided by the concluding summary in the indictment, "and so &c."

Shaffer vs. The State, 35 N. W. Rep., 384.
Leonard vs. Territory, 7 Pac. Rep., 872.
Fouts vs. State, 8 O. St., 98.

REPORT OF BRADFORD ERRONEOUSLY ADMITTED.

III.

The admission in evidence, at the instance of the Government, of the report of ex-Attorney-General Bradford was erroneous, and manifestly prejudicial to the defendants.

The tenth assignment of error states the general nature of the grounds of error in this behalf as follows:

"*Tenth.* The Court erred in permitting the counsel for the Government to read from the report of Attorney-General Bradford in the hearing of the jury certain statements, then to ask the witness Bradford, if he did not make the statements so read in said report, and in overruling the objections of plaintiffs in error thereto. And the Court erred in admitting in evidence, over the objections of plaintiffs in error, certain parts of said report, as shown of record, because said witness Bradford was placed upon the witness stand by the Government as a rebutting witness after counsel for Government knew what he would testify to, and said witness had testified as such rebutting witness to the exact facts that the Government's counsel had expected him to testify to; and because said witness had stated that plaintiff in error, C. E. Cook, did not state to him in language or in substance the statement contained in said report; because what witness stated in said report was not a report required of him in his official capacity as Attorney-General of the State of Kansas. Neither said report nor any part thereof was relevant or competent, and is hearsay, and ought not to have been admitted in evidence."

This assignment of error covers the admission at the trial of the report of Mr. Bradford, late Attorney-General of Kansas. Mr. Bradford was the Attorney-General of Kansas at the time of the killing of Cross.

But prior to the date of the trial his term of office had expired and he was one of the counsel for the defendants. It appears that when he was Attorney-General he went under instructions from the Governor of Kansas to investigate the matter of this homicide. About a week after it occurred he went to the scene of it, talked with various people, including some of the defendants, made memoranda thereof, went home and handed them to his stenographer, who compiled them into a report to the Governor, which Mr. Bradford signed. This report was in the possession of the counsel for the Government.

When they came to their case in rebuttal they endeavored to support it by getting in evidence this report, for two reasons: 1st, It contained statements at variance with the defendant's theory of the case at the trial; and 2d, It could be used with damaging effect as the opinion of one of the leading counsel for the defendants when he was acting in an official capacity and before he became their counsel.

If the Court will read the bill of exceptions in this respect it will distinctly appear that the counsel for the Government in calling Bradford as a witness were not misled or surprised.

Mr. Bradford had not testified as a witness on behalf of the defendants. He was offered as a witness in rebuttal by the Government. Its counsel, instead of trying to prove admissions to him by the defendants, interrogated him at length concerning his report; and all such portions of it as the counsel offered were admitted in evidence. It was plainly hearsay and nothing more. Mr. Bradford distinctly said that all he said in

his report was simply his own conclusions from what he had been told.

The following extract from the bill of exceptions shows the action of the Court. The witness, Bradford, had denied that Cook and other defendants had made certain statements to him. The counsel for the Government asked:

Q. Did anybody state it?

> MR. HODGES: "We object to what anybody stated."
>
> THE COURT: "I do not think it would be admissible unless in the presence of one of these defendants."

"MR. COMB. (To witness):

Q. Was it in the presence of either one of these defendants?

A. I do not remember that I heard it in the presence of these defendants.

Q. Did you ask them, the Cooks, or any of these defendants, or ask it in any of their presence, why it was that none of the Hugoton party were injured in the affray?

A. I did.

Q. Did they answer that it was because Cross and his men fired over the top of them?

A. I do not know that they answered me in that language? All I said in that report was my conclusions from what I had been told.

Q. I will ask you if they said that, because Cross and his party fired over the top of them from that haystack?

A. No, sir, none of these defendants.

Q. Did Cook say that they dismounted from their horses, and got out of their buggies and approached the stacks and fought in self-defense?

A. No, sir.

Q. I will ask you to look at that (handing witness paper)?

A. That is what I say there. But they did not tell me any such thing. I say that the language that is there in that line is what I said.

Q. I will ask you if C. E. Cook said to you that they intended to camp at the hay camp, and when they approached the hay camp, they were fired upon by the Woodsdale parties; that they returned the fire and killed Sheriff Cross and the other men and wounded the boy?

A. No, sir.

Q. Did Mr. O. J. Cook?

A. No, sir.

Q. Did Mr. Chamberlain?

A. No, sir.

Q. Did Mr. Lawrence?

A. No, sir.

Q. Did Mr. Calvert?

A. No, sir.

Q. Did any of these defendants?

A. No, sir.

Q. I will just ask you to look at this to refresh your memory (handing witness paper.) Did they state that in substance?

A. No, sir."

After the Ex-Attorney-General had thus clearly stated his want of information from any of the parties on trial, the Government's counsel were permitted over the defendants' distinct and specific objections to read to the jury from his report as follows:

"I interviewed the two Cooks, Sam Robinson, and various other persons. The Cooks were very determined. They insist that the Woodsdale fellows were at fault. They admit that they were with the party that did the shooting; they say the shooting was in self-defense; that they were fired upon. This statement was agreed to by all parties who were with the Hugoton party who did the shooting."

No. 2. "The Hugoton party all agree in one statement, as I have before stated, that they themselves were intending to camp at the hay camps, and that when they approached the hay camp for the purpose of going into the hay camp, they were fired upon by the Woodsdale parties—the Sheriff's posse—and that they returned the fire and killed Sheriff Cross and the three other men, and wounded the boy."

"I first took Scott's statement. He agreed substantially with the Hugoton people. He said he had been at Hugoton, and made a statement in writing and gave it to the Hugoton people. He said, in substance, that this party came there, as stated by the boy, after nine o'clock. He said he was a partisan and a friend of the Hugoton faction. * * * That he undertook to go out of the tent, and that some one told him to stay back. He says that he recognized nearly all of the persons whose names I have heretofore given, including Chamberlain and Cooks and Sam Robinson; and he thinks there were some persons there who were not named in the list I have heretofore given."

"In this draw we observed horse tracks, tracks of men on foot, and buggy tracks, indicating that one part of this Hugoton party had followed this trail in their approach to the camp. Near one of the hay stacks we observed buggy-tracks which had come from the trail. On the east side of the stacks and the south side of the stacks were buggy tracks."

"Cook's party of the Hugoton faction say they were fired on from this little stack; and when I asked them why it was that none of the Hugoton party were injured in this affray, they insist that it must have been because Cross and his men fired over the top of them. Cook agrees that they dismounted from their horses and got out of their buggies as they approached the stack; and maintains that they fought in self-defense."

This was an account of the transaction greatly at variance with the defendant testimony, and permitting it to go to the jury was highly prejudicial to the defendants and to all of them coming from a report made by one of their own counsel. The Court states in the bill of exceptions that he admitted the report in evidence, not as a public document but to show that Mr. Bradford had made different statements at another time and place. What the Court instructed the jury on this point will be presently shown.

The report was shown to Bradford, and he denied having made the statements therein contained; the

Government was then permitted to read his report. That a witness may be interrogated by the party calling him as to different statements than the one there given may be admitted, and this for the purpose of refreshing the memory of the witness or of explaining the fact that he has been called. This is the extent of the rule; to permit contradiction of the witness by proof of different statements out of court is opposed to the English and American authorities.

Regina vs. Williams, 6 Cox C. C., 343.
The Lochlibo, 1 Eng. L. & E., 645.
Com. vs. Hudson, 11 Gray, 64.
People vs. Safford, 5 Denio, 112.
Bullard vs. Pearsal, 53 N. Y., 230.
1 Wharton Ev., Sec. 549.
2 Phillips Ev., 5th Am. Ed., p. 831.
Starkie's Ev., 10th Am. Ed., p. 250.
Best on Ev., Sec. 645.
Regina vs. Ball, 8 Car. & P., 745.
Com. vs. Welsh, 4 Gray, 535.
People vs. Jacobs, 49 Cal., 384.
Melhuish vs. Collier, 14 Jur., 621.
Adams vs. Wheeler, 97 Mass., 67.
Stearns vs. Bank, 53 Pa. State, 490.
Cox vs. Earyres, 55 Vt., 24.
Bauskette vs. Keith, 22 S. C., 187, 197.
Burkholder vs. Edwards, 16 Ga., 593.
B. & O. R. R. vs. State, 41 Md., 268.
Byerson vs. Abbington, 102 Mass., 526.
Hurley vs. The State, 46 Ohio State, 320.

To allow, as was done in this instance, as we shall presently show, such statements out of Court to go to the jury as substantive evidence that they are true, and that what the witness states on the stand, on oath,

is false, was, we think, a thing never heard of before it was done in this case.

The Court inserted in the bill of exceptions, in brackets, the following:

["The parts of Attorney-General Bradford's report admitted in evidence were neither offered nor admitted as a public document, but to show that witness had made different statements at another time and place."]

But the bill of exceptions does not state, nor does it appear, that the jury were instructed that the report was admitted for this limited purpose. On the contrary, it appears by the instructions to the jury that it was not admitted simply to contradict Bradford, but as substantial evidence on material and disputed points.

This instruction is set forth in the twenty-second assignment of error:

Twenty-second. The Court erred in overruling the objections of plaintiffs in error in instructing the jury as follows:

"If you believe from the evidence that as the defendants approached the haystacks that John M. Cross or any one of his party, or any person at said haystacks, fired upon said defendants, or did any act showing an intention of taking the life of any of the defendants, or inflict upon any of the defendants serious bodily harm, and that defendants returned said fire or fired to prevent such threatened danger, and that said Cross was thus killed, you are instructed that such killing would be justifiable homicide, and find the defendants not guilty."

"If you believe from the evidence that John M. Cross had threatened to take the life of any of the defendants, or to do any of the defendants serious bodily harm, you are instructed that you shall take such threats into consideration in order to determine who most likely commenced the combat; but that such defendants would not be justified, on the account of said threats, in taking the life of the said Cross unless said Cross, at the time he was killed, did some act showing

an intent on his part to kill or seriously harm some of the defendants, or that his acts then done so appeared to the defendants from their standpoint."

"The instructions given above are limited by the following instructions: The portions of Attorney-General Bradford's report were admitted in evidence to be considered by you whether or not the statements therein contained were made by the parties, to said Bradford, said Bradford now being the attorney for the defendants and denying the truth of the statements therein contained; and as to whether or not these statements were ever made to said Bradford, is a question of fact to be considered by you from all the evidence upon that subject; and if you believe the statements were not so made to said Bradford, you are to disregard the same; but if you believe from the evidence that they were so made to Bradford, then you are instructed to consider them as evidence, but only as to such parties by whom they were made."

In this instruction the jury are required to consider the statements of Mr. Bradford out of Court as substantive evidence against the defendants "said Bradford now being the attorney for the defendants and denying the truth of the statement therein contained." We know of no ground on which this charge can be defended. That a report or statement made by one who afterwards becomes counsel for a prisoner can be used as substantive evidence against the prisoner of his statements after the counsel has been called and denied that the prisoner made such statements is a proposition, we venture to say, without reason or precedent to sustain it.

"That such previous declarations cannot thus be made substantive evidence of the facts stated, is conceded; nor can such examination be permitted merely to impeach the witness." "It has never been claimed that such contradictory statements of the party's witness, are evidence of the facts so stated."

WILLIAMS, J., 46 Ohio St., pp. 322, 342.

This testimony was used with telling effect in the argument below, as being the views of one of the defendants' counsel before his employment in the case, and while he was acting as Attorney-General of the State of Kansas. If true, this statement went to the very heart of the controversy, and tended to show that the defendants were present participating in the homicide. Mr. Bradford had not placed himself in the position of an adverse witness, which would give the Government the right to call his attention to contradictory statements for the purpose of refreshing his recollection, nor is there any showing that the Government was taken by surprise by any adverse testimony from him. The contrary clearly appears from the bill of exceptions on this subject. So far as Mr. Bradford had any recollection of the matters inquired of, his testimony was neither for nor against the Government.

The portion of Bradford's report admitted in evidence stated that it was agreed by all the Hugoton parties (including all the defendants), in effect, that they were all engaged in the killing. And the Court charged the jury that the report was admitted as evidence to show whether the statements therein contained were made by the parties to Bradford, and if the jury believed from the evidence that they were made, they should consider them as evidence as to the parties making them. This was highly prejudicial to each and all of the plaintiffs in error. It allowed them to be convicted on the sheerest hearsay.

The observations of STORY, J., in the case of Ellicott vs. Pearl, 10 Peters (S. Court, U. S.), 440, are particularly pertinent:

"But, in truth, the evidence was offered to discredit in part his present testimony, and certainly the demandants are not at liberty to discredit their own witness by showing his former declarations on the same subject, though they may show by other witnesses that he was mistaken. But, independent of these objections, the evidence was inadmissible on general principles. It was mere hearsay."

"LIBERAL LEADER" ARTICLE ERRONEOUSLY ADMITTED.

IV.

The Court erred in admitting, under exceptions by the defendants, as evidence an article from a newspaper called "The Liberal Leader," purporting to be signed by the defendant Cook.

The 7th assignment of error states the general nature of the objections to this evidence as follows:

"The Court erred in overruling the objections of the plaintiffs in error and admitting as evidence portions of an article published in 'The Liberal Leader,' purporting to have been signed by C. E. Cook, one of the plaintiffs in error, because there was no evidence that C. E. Cook ever wrote said article; because witness Willsteap, who published said article, was unable to testify that he received the article by due course of mail; because there was no proof of any correspondence between Cook and said witness by mail, and did not know the handwriting of said Cook; and because said witness did not know that said Cook wrote said article; and because there was no predicate laid for its introduction for impeachment."

This testimony came into the case as follows:

The counsel for the Government then offered in evidence the following part of an article from the "Liberal

Leader," purporting to be signed by the defendant C. E. Cook, of date of July 28th, 1888: "They met Robinson in the Strip on his way home, about eleven miles in the Territory, and it was near midnight; concluded to go into camp at some haystacks near by. When they reached the stacks they were fired upon by parties secreted in the stacks, and a general fusillade began. When it ended, Sheriff Cross, Bob Hubbard, T. Eaton and Wilcox were dead, and a young man named Tonney was seriously wounded. Sam Robinson, of the Hugoton party, was shot through the leg. Any statement different from this is false, as this is written by an eye-witness to the whole proceeding." Signed, "C. E. COOK."

The bill of exceptions in respect of this testimony is as follows:

"And be it further remembered, that on the trial of this cause the counsel for the Government asked the defendant Chas. E. Cook, on his cross-examination as a witness, if he did not send a communcation to the "*Hutchinson News*" shortly after the killing of the deceased, John M. Cross, signed by him, C. E. Cook, in which he stated that he was present when John M. Cross and three others were killed and Tonney wounded, and that as he, Cook and party, approached the haystacks, they were fired upon from the stacks by John M. Cross and party, and that thereupon a fight ensued, and John M. Cross, Bob Hubbard, T. Eaton and a man by the name of Wilcox was killed, and Tonney wounded; to which the witness, C. E. Cook, answered that he did not.* The Government, when introducing its rebuttal testimony, introduced and had sworn as a witness for the Government one Lambert Willsteap, when the following questions were asked the said witness, to which he gave the following answers, to wit:

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*Observe that the Government, though in possession of the article, did not, as it ought (1 Greenl. Ev., Sec. 463), show the article to the witness.

COUNSEL FOR THE GOVERNMENT: Q. What is your name?

A. Lambert Willsteap.

Q. Where do you live?

A. Liberal, Seward County, Kansas.

Q. How long have you lived there?

A. Little over two years.

Q. Were you there in 1888?

A. Yes, sir.

Q. What business were you engaged in?

A. I published a weekly newspaper.

Q. What is the name of it?

A. *Liberal Leader.*

Q. Do you know C. E. Cook?

A. I am only slightly acquainted with him.

Q. Was he an editor in 1888?

A. Yes, sir.

Q. Of what paper?

A. Of the Hugoton "Herald."

Q. You say you have a slight acquaintance with him?

A. Yes, sir.

Q. Did you receive any correspondence or communication from him to your paper at the time of that killing?

A. At the time of the killing I wrote to him to give me a statement.

Q. To give you a statement?

A. Yes, sir.

Q. Did he give you a statement?

A. Yes, sir.

Q. Signed by him?

A. Yes, sir.

Q. What did you do with the statement?

A. I telegraphed a copy of it to the Associated Press, and published it also in my paper.

Q. That is the statement he gave you?

A. Yes, sir.

Q. You published it in the *Liberal Leader?*

A. Yes, sir.

Q. I will ask you to look at that [handing witness a newspaper file]—at this article?

A. That is the statement, sir.

Q. You say you got the statement from C. E. Cook?

A. Yes, sir.

Q. What paper is this?
A. This is the *Liberal Leader*.
Q. What issue is it?
A. I believe it is August 2d.
Q. Look and see?
A. Yes, August 2d, 1888, Vol. 1, No. 54.

CROSS-EXAMINATION:

Counsel for the defense:

Q. Did you ever know C. E. Cook?
A. I am not much acquainted with him.
Q. I will ask you where you ever knew him?
A. I saw him in Liberal once or twice.
Q. Did you ever see him before this occurred?
A. I could not say whether I did or not.
Q. Did you ever know anything about his handwriting?
A. No, sir.
Q. Where is that original document you had?
A. I did not save it.
Q. Where did you get it from?
A. If I am not mistaken I got it from the mail.
Q. How did you get any document by mail from him?
A. I might have got it by courier; I am not positive.
Q. Do you not know another man gave you that document, and not C. E. Cook?
A. It was signed C. E. Cook.
Q. Do you not know that you never received an answer to the letter you wrote Cook?
A. I did receive an answer.
Q. By mail?
A. I either got it by mail or by courier.
Q. I will ask you if another man did not give you this letter, or this document, you published?
A. It is possible I got it by courier.
Q. If another man or a courier gave you this letter, how do you know you ever received an answer from Cook? You think it possible that another man gave it to you?
A. Yes, sir.
Q. You do not know that C. E. Cook ever saw the

document you got, do you, or know that there was such a one in the world?

A. I do not know whether he did or not.

Q. All you know is, the man handed a document signed C. E. Cook, and you published it; that is your best recollection?

A. Yes, sir.

RE-DIRECT EXAMINATION BY COUNSEL FOR GOVERNMENT:

Q. You say that you asked him for a statement, and in reply you received this?

A. Yes, sir.

Q. And published it?

A. Yes, sir.

Q. It was signed C. E. Cook?

A. Yes, sir.

Q. This is a correct copy of the letter you received?

A. Yes, sir; to the best of my knowledge.

Q. I will ask you if a copy of it was not also sent to the *Hugoton Herald*, and this letter published in the *Hugoton Herald?*

A. I do not remember whether it was or not.

Q. You say you hunted for the original copy and could not find it?

A. Yes, sir; I looked all over for it.

Q. You were asked to bring it here?

A. Yes, sir; I looked in every corner and could not find it; I am very sorry I could not find it.

COUNSEL FOR GOVERNMENT (to the Court): I now propose to offer in evidence that part of this, to which the attention of the defendant was called while on the stand, by way of impeachment. We asked him if he did not sign a statement and send it to the Liberal "Leader," sign it C. E. Cook, and he said he did not.

MR. BRADFORD (for the defense): That is objected to as incompetent, irrelevant and immaterial.

MR. HODGES (for the defense): "A further objection is, that this witness does not know that C. E. Cook ever saw that article, and he admits that probably another man handed it to him; that he did not get it by mail, but by courier."

THE COURT: "I will ask Mr. Willsteap a few questions."

THE COURT: Q. What is your best recollection as to how you received this communication, whether by mail or courier?

A. I am not positive whether I received it by mail or courier; I received it, I know.

Q. Have you any distinct recollection as to whether you received it by mail or courier? What is your best recollection?

A. I am under the impression I received it by mail.

MR. MCCOMB, Government's counsel, to witness:

Q. In due course of mail?

A. Yes, sir.

MR. HODGES, for defense, to witness: Q. Did you not state, in answer to my question, that your best recollection was, you received that by courier?

A. No, sir; I said I was not sure.

Q. How came you to think it possible you received it by courier?

A. Why, I would be most likely, I think, to receive it by mail; it might be possible I received it by courier, because there was a good deal of intercourse between the towns at that time: people from Stevens county—some of them—were in Liberal most every day, and so it might have been easy to get it by courier; that is—

Q. When did you receive that?

A. I cannot tell the exact date, but I received it two or three days after that, after we received the news of the occurrence. I am not positive.

Q. Then you had written to Cook and got an answer back in two or three days after you heard it?

A. I think that is possible. You see, at that time I was procurer of news; I had no interest at all in the matter, otherwise I would have taken good care to have the dates.

Q. What did you do with the original?

A. I must have thrown it away, or burned it up.

Q. Did anybody ever see it but you?

A. My boy saw it.

Q. You do not know that it ever came from C. E. Cook at all?

A. I could not swear to it.

Q. You could not state on oath that you received it through mail?

A. No, sir.

MR. MCCOMB (Government counsel): Q. You had a daily mail between the places down there?

A. Yes, sir.

Q. Your best recollection is you received it by mail? You sent your request by mail, did you not?

A. Yes, sir.

MR. HODGES (counsel for defense to the Court): "C. E. Cook was asked if he did not send this communication to the *Hutchinson News* and not to this witness at all. He said he did not send it to the *Hutchinson News*. This does not touch the predicate laid at all. There is no predicate laid for this at all. This witness does not know whether he received it by mail or courier. Then it does not prove anything. We do not know that Cook ever saw it; do not know that Cook ever read it. This witness does not know Cook's handwriting, and does not know whether he ever wrote or read it."

THE COURT: "The objections are overruled."

MR. HODGE: "We object to the reading of this newspaper article; it is irrelevant."

THE COURT: "I do not understand it is the purpose to read the newspaper article, except the particular matters that Cook was asked about. I state to you, gentlemen of the jury, that this is not admitted as to any other defendant except Cook, and it is not admissible except for the purpose of contradiction as far as C. E. Cook is concerned. It is also admitted as a declaration of what occurred."

MR. MCCOMB: "I will now read that part referred to: 'They met Robinson in the Strip on his way home, about 11 miles in the Territory, and as it was near midnght concluded to go into camp at some haystacks near by. When they reached the stacks they were fired upon by parties secreted in the stacks, and a general fusilade began. When it ended, Sheriff Cross, Bob Hubbard, T. Eaton and Wilcox were dead, and a young man by name of Tonney was seriously wounded. Sam Robinson, of the Hugoton party, was shot in the leg. Any statement differing from this is false, as this is written by an eye-witness of the whole proceedings.' That is all we asked him. It is signed, 'Yours truly, C. E. Cook, Saturday, July 21st, 1888.'"

The ruling of the Court was erroneous.

1st. The article ought to have been shown to the witness Cook, and been made the basis of the interrogation of him, in respect of his having written it (1 Greenl. Ev., Sec. 463).

2d. It was not proved that Cook wrote it.

3d. It did not disprove Cook's statement.

In support of these objections we may observe that while this evidence was professedly offered to impeach Cook, no proper foundation or "predicate," as it is called in the record, was laid for its introduction. Cook was asked in cross-examination if he did not send a communication to the *Hutchinson News* shortly after the killing of the deceased, John M. Cross, signed by him, C. E. Cook. The contradiction offered and admitted was a communication to *The Liberal Leader*. That it is necessary to lay the foundation for such contradicting testimony by calling attention to time, place and circumstances of the contradiction so that the witness can deny it, or make any explanation tending to reconcile what he formerly said with what he is testifying, is, in accordance with the general rule, settled in this Court in Ayers vs. Watson, 132 U. S., 394.

There was no proof that Cook had written the letter to the *Liberal Leader*. There was no proof of C. E. Cook's handwriting, and certainly no direct testimony that the letter was written by him. And the circumstantial or presumptive evidence adduced, was wholly defective. There was no evidence of Cook's residence; or, of the name of his post-office; or, to what post-

office the letter was directed; or, that it was stamped; or, that there was any post-office at Hugoton.

Rosenthal vs. Walker, 111 U. S. 185, 193.

There was evidence that in 1888 he was editor of the *Hugoton Herald.* During what part of the year he was such editor, whether when the pretended letter was written or not nowhere appeared.

There was no foundation laid for the admission of the letter, which has ever been recognized by any Court.

The Court said, in regard to the letter, "I state to you, gentlemen of the jury, that this is not admitted as to any other defendant except Cook, and is not admissible except for the purpose of contradicting as far as C. E. Cook is concerned. It is also admitted as a declaration of what occurred (Record, p).

It is also admitted as a declaration of what occurred. It is *also* admitted against whom the Court did not say. The jury may well have understood the Court to mean that it was admitted against *all* the defendants, as a declaration showing what occurred when Cross was killed, if, in fact, such was not what the Court intended.

We also contend that the Court erred in permitting the Government to introduce, a portion only, of the pretended letter. If at all admissible the whole letter should have been introduced.

2 Wharton's Ev., Secs. 1103, 1105.

ERRONEOUS REFUSAL TO ALLOW WITNESS SHIRLEY TO TESTIFY.

V.

The Court erred in a most material matter in refusing to permit Owen Shirley, one of the defendant's witnesses, to testify after having excluded his previous statements from the jury.

This matter is so important and the facts are in such a small compass, that we here give, for the convenience of the Court, the whole of the bill of exceptions on this point.

"Be it further remembered, that at the commencement of the trial of the said cause, the witnesses on behalf of the Government and said defendants were called into Court, and after being sworn and placed under the rule, were then permitted by the Court, by consent of counsel, to go out of the court room and remain out of the hearing of the trial, and instructed by the Court to converse with no one except counsel about the case, and not to read the papers. When the witnesses were so called, some of them failed to answer to their names. Counsel for the Government and for the defendants in open Court then agreed to have the absent witnesses sworn, instructed, and put under the rule, when they came to the court room, which was so ordered by the Court, and the Court ordered the Marshal not to allow any of the witnesses to come into the court room during the time the evidence was being detailed, except as called.

When the said defendants were offering and introducing their evidence in chief they offered one Orin Shirley as a witness, who was summoned as such for the defense, but from some cause was not placed under the rule, which fact was not known to the defendants or their counsel until said witness was called to testify. The witness stated on the stand as follows, to wit:

COUNSEL FOR DEFENDANTS:

Q. Where do you live?
A. Hugoton, Stevens County, Kansas.
Q. How long have you been living there?
A. About four years.
Q. Did you know John Cross?
A. Yes, sir.
Q. How long did you know him?
A. Four years—about four years.
Q. Do you remember about the time of the bond election in Hugoton, in that county?
A. Yes, sir.
Q. Did you see him along about that time?
A. I saw him that day.
Q. Do you remember of having a conversation with him, at any time within a few months before this killing took place, in which he mentioned these defendants?

COUNSEL FOR GOVERNMENT: "Ask him when he had the conversation."

COUNSEL FOR THE DEFENSE: "I do not know myself. I am trying to get at the particular conversation."

(To the witness): Q. Did you have a conversation with him at any time?
A. I had a conversation with John Cross the day of the election.
Q. Where were you?
A. I was between Mrs. Miles's hotel and Stehle's drug store, right there by a building known as the Cowan building—kind of a confectionery store.
Q. Did you have any other conversation except that—that took place at that particular point?
A. I don't believe I talked to him only.
Q. Where was the conversation? Name the place you talked to him that day?
A. Right in front of the confectionery building.
Q. That is the time you had the conversation?
A. Yes, sir; I met him there.
Q. There is where you met him?
A. Yes, sir; he was going north and I was going south, and I met him on the street there.

Q. I will ask you if in that conversation he made any threats against these defendants?

A. Well, sir, I met him there——

Q. Answer the question—did he make any threats?

A. Yes, sir.

Q. What was it he said?

A. He said if Sam Robinson didn't let him alone he would fill his hide so full of shot it wouldn't make a seive, and Chamberlain had better look out, or he would get him too. That was the day of the bond election.

Q. How was the feeling there?

A. They were all opposed to the election, that town was.

Q. How was Cross?

A. He was in favor of it.

Q. Were you and John Cross friendly?

A. Yes. sir.

Q. Had you always been friendly, or not?

A. Yes, sir.

Q. Now, do not answer this question. I want to ask you the question— how did this conversation come up between you and Cross?

COUNSEL FOR GOVERNMENT: "I think your Honor has ruled on that."

THE COURT: "I do not care how it came up."

COUNSEL FOR DEFENDANTS (to witness): Q. "State to the jury all that was said between you and Cross?"

THE COURT: "You needn't answer that."

COUNSEL FOR DEFENDANTS: "We are asking him the question in order that it may go on the record."

CROSS-EXAMINED:

COUNSEL FOR THE GOVERNMENT: Q. How long have you lived in Hugoton?

A. Off and on for four years. I lived on a claim a part of the time, and part of the time in town.

Q. What is your business?

A. I do anything to make any money out of it—moving houses, farming, freighting.

Q. You are still living in Hugoton?

A. I am now; yes, sir.

Q. How long have you been down here?
A. Be eight weeks to-morrow.
Q. Been here eight weeks?
A. Yes, sir.
Q. You are in the witness business now, are you?
A. Yes, sir.
Q. Who was present when you had that conversasation with Cross?
A. A brother of mine.
Q. Is he here?
A. Yes, sir.
Q. He is in the witness business, too?
A. Yes, sir.
Q. What is his name?
A. Shirley.
Q. His given name?
A. Ora Shirley.
Q. Just you and your brother, and Cross?
A. Yes, sir.
Q. Whereabouts in town did you live then?
A. I lived in the north end of town.
Q. Did you ever hear Mr. Calvert talk about this case?
A. No, sir; I never did.
Q. Did you ever hear Mr. Cook talk about it?
A. I never did; I never heard him particularly speak about it.
Q. Either of the Cooks?
A. No, sir; not particularly.
Q. Did you ever hear Mr. Jackson speak about the case?
A. No, sir.
Q. Did you ever hear Mr. Lawrence speak of it?
A. No, sir.
Q. Did you ever hear Mr. Calvert talk about it?
A. No, sir.
Q. Did you ever hear Mr. O'Connor talk about it?
A. No, sir.
Q. Did you ever Mr. Donald talk about it?
A. No, sir.
Q. Did you ever hear Mr. Grubbs talk about it. Do you know all of these defendants here?
A. Yes, sir.
Q. Have you talked with them since you have been here?

A. Yes, sir.
Q. Talked with them about this case?
A. No, sir; not particularly.
Q. Just talked generally?
A. Just in a friendly way, is all.
Q. Have you been sworn and put under the rule?
A. No, sir.
Q. You were never instructed not to talk about this case, or any of the evidence?
A. No, sir.
Q. You have not been reading any of the papers?
A. No, sir.
Q. You never read the papers, do you?
A. Hardly ever; sometimes I do.

COUNSEL FOR THE GOVERNMENT (to the Court): "I have no further questions."

COUNSEL FOR THE DEFENDANTS: "I will ask to have the witness sworn."

THE COURT: "I will exclude all of this evidence. The jury will not regard it. He has neither been instructed, sworn, nor anything else. (To the witness) Stand aside."

COUNSEL FOR DEFENDANTS: "We ask to have the witness sworn."

THE COURT: "The witness will stand aside."

COUNSEL FOR THE DEFENDANTS: "We except to the ruling of the Court."

THE COURT: "Yes, sir. (To the jury) You will not regard anything that that man said."

Counsel insisted that the witness be allowed to be sworn and allowed to testify, because they then and there stated to the Court that they did not know that the witness had not been sworn until he so stated on cross-examination; that the defendants and their counsel are in no way to blame. The Court had told the Marshal at the door of the court-room not to allow any witnesses in this case to come into this court-room during the trial. This was done after the Court knew that the witnesses were not all under the rule that had been called, and it was agreed to put them under the rule when they reported. Defendants ought not to be deprived of witness' testimony on the ground that witness had not been sworn and put under the rule. The Court refused to allow the witness sworn

or to testify, to which said ruling of the Court the defendants then and there excepted.

It will be noticed that it does not appear that the witness Shirley was at any time present in Court when the trial was going on, or that he had disobeyed the rule of the Court in any respect.

Where a witness offered by a party is, without legal grounds therefor, refused to be allowed to be sworn and to give any testimony whatever, that must be a fatal error in any case, and surely so in a case of life and death. No Court is clothed with a power so despotic and awful. In such a case it cannot be necessary to show that the testimony was material, because its materiality is not the ground of the exclusion. It is beyond finite power to tell what might have been proved or its effect upon the minds of the jury if the witness had been allowed to testify.

But it had already appeared, from his unsworn statements to the jury, that the witness had knowledge of very serious threats made by Cross against two of the defendants. Other facts might have been developed if the witness had not been arbitrarily excluded.

The rule is thus stated in 1 Bishop Crim. Pro., 3d Ed., Sec. 1191: "If the party is without fault, the judge has no right to punish his innocence by depriving him of his evidence, and ruin him at the will of a witness."

To the same effect:

Wharton's Crim. Ev., Sec. 446.
People vs. Boscowitch, 20 Cal., 436 (FIELD, J.).

"The violation of the rule of exclusion does not render the witness incompetent, unless the party calling him procured or connived at such violation; and the

party is presumed innocent unless something in the record shows the contrary.

"When the competency of a witness is objected to for any reason, it is presumed that no other ground of exclusion exists. It is enough for the record to show that the particular reason given for the exclusion is insufficient."

Davenport vs. Ogg, 15 Kansas, 363.

In the late case of Dickson vs. The State, 39 Ohio St., 73, it is distinctly held that the Court has no discretion to prevent the examination of a witness who has remained in Court in violation of an order for the separation of witnesses, unless it appears that the witness has violated the rule by procurement or connivance of the party calling him. In the present case there is no showing that the witness Shirley was guilty of any willful violation of the rule, and the record negatives any suggestion of connivance or procurement of the defendants or their counsel. We repeat that the record does not even show that the witness had, in any respect, violated the rule.

It clearly appears what was proposed to be proven by the testimony of Shirley. As stated, he had testified in chief and upon cross-examination. Had the record failed to show this, the witness having been rejected as incompetent to testify in the case, prejudice will be presumed to the party offering him.

Wolf *et al.* vs. Powner, Exr., *et al.*, 30 Ohio St., 472.

The ground of exclusion being wholly irrespective of the *subject matter* of his testimony, it will be presumed that the party offering the witness has been prejudiced by his exclusion.

Hollister vs. Reznor, 9 Ohio St., 1.

He was offered as a witness by all of the defendants, and this error is available to all of them.

ERRONEOUS EXCLUSION OF THREATS.

VI.

The Court erred in excluding testimony of threats by the deceased, as set forth in the 11th, 12th, 13th and 15th assignments of error.

These assignments of error may be considered together. They are as follows:

Eleventh. The Court erred in sustaining the objection of the Government and excluding from the jury the conversation and statement of deceased, John M. Cross, to witness, S. W. Dunn, and excluding the testimony of said Dunn, to the effect that said Dunn was Sheriff of Seward County, Kansas, and went to Woodsdale, Kansas, only a few days before the killing of John M. Cross, to arrest Bob Hubbard, who was killed at the same time that Cross was killed. That witnesss made his business known to Cross, and informed Cross that he, the witness, had a warrant for Hubbard, charging him with the offense of assault with intent to kill. Cross first said: "I am now looking for Hubbard, and you can get him;" but later in the day Cross told witness that he, Cross, had had a good deal of trouble in Stevens County; that certain parties had given him dirt. He named the Cooks, Chamberlain, Calvert and Sam Robinson (defendants below), as the parties who had given him dirt, and said he wanted to use Hubbard against the Hugoton fellows; that he thought that Hubbard was the kind of a man he wanted, and therefore he would rather the witness would not arrest him. That witness failed to get Hubbard. That the witness informed the defendants of this conversation and these facts before the killing of Cross. As shown of record filed herein.

Twelfth. The Court erred in excluding from the jury the threats of the deceased, John M. Cross, against Sam Robinson and some of these plaintiffs in error, made to witness T. H. Ferguson, and sustaining the Government's objection thereto; and in excluding the testimony of witness T. H. Ferguson, to the effect that the witness and one John M. Cross (the deceased) used and occupied the same office together, and a short time before Cross was killed Cross, in the office one day, speaking about the troubles they had had, said he "would kill Sam Robinson the first opportunity he got, and if the Cooks and Chamberlain did not look out they would get what they did not want." And as shown of record filed herein.

Thirteenth. The Court erred in excluding from the jury the testimony of W. S. Steele, offered by plaintiffs in error, of threats of deceased, John M. Cross, against Sam Robinson; that he, the witness, resided in Hugoton, Kansas, in July, 1888; that witness had a conversation with deceased, John M. Cross, only a few days before he was killed; that in said conversation Cross made threats against the life of Sam Robinson, one of the parties indicted in this cause, but not on trial; that he heard Cross say a few days before he was killed, that he, Cross, and defendant, Sam Robinson, could not live in the same county; that he had no warrant for Sam Robinson, and he did not want to arrest him, "But, God damn him, he would kill him." Witness testified to the Court, that he informed Sam Robinson of these threats the same day, but could not say that Cross made any threats against any of these defendants on trial. And in sustaining Government's objection thereto, as shown of record filed herein.

Fifteenth. The Court erred in refusing to allow the witness Oren Shirley to be sworn and testify in the cause, and in depriving these plaintiffs in error of the testimony of said witness in said trial, to the effect that witness had a conversation with deceased Cross only a few days before he was killed, in which Cross said to witness: "If Sam Robinson didn't let him alone he would fill his hide so full of shot it wouldn't make a sieve, and that Chamberlain had better look out or he would get him too." As shown of record filed herein.

These assignments of error present the question of the admissibility of the threats of John M. Cross, the deceased, against the life of Robinson and some of the defendants on trial, they belonging to the Robinson party. It appears from the record that there is a conflict of proof as to whether Cross and his party were the aggressors in the conflict resulting in the death of Cross. The testimony admitted at the trial, in the report of Attorney-General Bradford, before referred to, states:

"The Hugoton party all agree on one statement, as I have before stated, that they themselves were intending to camp at the hay camps, and that when they approached the hay camp for the purpose of going into the hay camp they were fired upon by the Woodsdale parties—the Sheriff's posse—and that they returned the fire and killed Sheriff Cross and the three other men and wounded the boy."

Also the article from the "Liberal Leader" put in evidence by the Government, and before referred to, purporting to be signed by the defendant Cook:

"They met Robinson in the strip on his way home, about eleven miles in the territory, and it was near midnight; concluded to go into camp at some haystacks near by. When they reached the haystacks they were fired upon by parties secreted in the stacks, and a general fusilade began."

There was also other testimony in the case tending to show that the firing was commenced by Cross and his party.

The Court in the charge recognized the fact that this question was in the case. It said to the jury:

"If you believe from the evidence that as defendants approached the haystacks John M. Cross or any of his party, or any person at said haystacks, fired upon the

defendants, or did any act showing an intention to take the life of any of the defendants, or to inflict upon any of the defendants serious bodily harm, and that defendants returned said fire, or fired to prevent such threatened danger, and that said Cross was thus killed, you are instructed that such killing would be justifiable homicide, and find defendants not guilty.

"If you believe from the evidence that John M. Cross had threatened to take the life of any of the defendants, or to do any of the defendants serious bodily harm, you are instructed that you take said threats into consideration, in order to determine who most likely began the combat; but that defendants would not be justified on account of said threats in taking the life of said Cross, unless said Cross, at the time he was killed, did some act showing an intent on his part to kill or seriously harm some of the defendants, or that his acts then done so appeared to the defendants from their standpoint."

It thus appears that it was important for the jury to consider which of the parties began the conflict which resulted in the death of Cross. That the evidence offered and excluded showed a settled purpose on the part of Cross to attack and even to kill Robinson and others of his party, including some if not all of the defendants, there can be no question. Cross and his party were outside of his jurisdiction as Sheriff, were heavily armed and in search of Robinson. Some of the threats it was offered to be shown were communicated to the defendants. The authorities all agree that communicated threats may be shown. The law as settled by this Court required the admission of this testimony under the circumstances of the case.

Wiggins vs. People, etc., in Utah, 93 U. S., 465.

The second proposition of the syllabus of that case is :

2. "In a trial for homicide, where the question, whether the prisoner or the deceased commenced the encounter which resulted in death, is in any manner of doubt, it is competent to prove threats of violence against the prisoner made by the deceased, though not brought to the knowledge of the prisoner."

There can be no distinction in principle, because the proposed proof of threats did not include all of the defendants. Robinson, Cook and Chamberlain were charged jointly with the other defendants. The Government claimed that the others were with Robinson at the time of the killing and participating in his intentions and acts. The jury must have so found by their verdict, it was therefore material to know the design and purpose of Cross towards Robinson, the leader of the party opposed to Cross and his party. The Court in effect so charged, and yet excluded the evidence offered tending to show the purpose of Cross to kill Robinson on sight, and his like evil intentions towards Chamberlain and Cooks.

Robinson, though not upon trial, was conceded on all sides to have been one of the principal actors at the scene of the homicide; the defendants on trial were charged jointly with him. It was claimed by the Government, and the jury must have found, the defendants to have acted with him at the time. The fact that Cross was likely to attack Robinson when jointly acting with the defendants was shown by the threats offered to be proved by the defendants, and was as important for them to show as it would have been had Robinson been upon trial. The mere fact that Robinson, although indicted, was not arrested and tried could not disassociate him from the other defendants at the time of the encounter. Threats against one of those jointly

accused, and whom the evidence tended to show were present, would be available for all.

A threat of Cross against Robinson, or either of the accused, would tend to show that Cross made the first attack, at least on the person threatened, and would be important as tending to show, in favor of all, self defense, or to disprove malice, and reduce to manslaughter.

Besides, they are all charged and convicted of being present when the firing took place. Each, therefore, had the right not only to defend himself, but to prevent Robinson, or either of the others, from being murdered or greatly injured, even by taking the life of the assailant.

2 Wharton Cr. L., 6th Ed., Secs. 935, 938, 1019.
1 Bishop's Cr. L., Sec. 877, 5th Ed.
Commonwealth vs. Riley, Thatcher's Cr. Cases, 471.
Horrigan & Thompson's Self Defense, p. 750, n. 2 and 4.

A threat against either would tend to show the danger to which he was exposed, and the right of the others to interfere. The threats against Robinson and others of the defendants, which were excluded, should have been admitted. It could make no difference that Robinson was not on trial if he was present at the transaction. The condition of affairs at the time of transaction, and not who were on trial, was the material consideration.

All were entitled to the benefit of any testimony which would tend to justify or palliate the act of either of those present.

CONTRADICTORY EVIDENCE ADMITTED AND EXCLUDED.

VII.

The Court erred in the admission and rejection of evidence in the particulars specified in the below-mentioned assignments of error.

The eighth assignment of error is as follows:

EIGHT. The Court erred in overruling the objections of plaintiffs in error and allowing the prosecution to ask the witness Scott if he had not offered the witness Keen Haws two hundred dollars to go to Kentucky, and then permitting the prosecution to show by Keen Haws that Scott made such an offer; and the Court erred in refusing to allow the defendants C. E. Cook and A. M. Donald, in the Court below, when testifying as witnesses for themselves and other defendants, to state what the conversation was between C. E. Cook and Keen Haws at McPherson, Kansas, and to explain to the jury what, if anything, was said by Cook to the witness Haws about paying him to testify for defendants in Court below, and sustaining the Government's objection thereto, as shown by record filed herein. (This appears on the record, p. .)

We submit that the matters drawn out on cross-examination of the witness Scott were collateral and could not be contradicted. He was asked if he had not offered Keen Haws two hundred dollars to go to Kentucky and not testify against the defendants, and whether he did not tell Haws that the defendants would give him that amount to testify for them, and that he had two hundred dollars, or could get that amount from the defendants. Having answered these several questions in the negative the Government was permitted to contradict the witness by showing that

he did make such statements (Record, p.). The matters being entirely collateral to the issue, the Government was concluded by the answer of Scott on the cross-examination.

Harris vs. Tippett, 2 Camp., 637.

A witness for the defendant having denied, on cross-examination, that he had attempted to dissuade a witness examined for the plaintiff from attending Court, it was held that he could not be contradicted. A witness for the Crown having denied, on cross-examination, that he had been charged with robbing the prisoner, it was held that witnesses could not be called to contradict him.

R. vs. Yewin, 2 Campb., 638.

In Attorney-General vs. Hitchcock 1 Welsby, H. & G. 91, inquiry was made of a witness for the Crown, on cross-examination, whether he had not said that the Crown officers had offered him a bribe to testify, as he in fact did testify in his examination-in-chief. The witness denied that he had so stated, and Pollock, C. B., refused to permit the witness to be contradicted. A rule was obtained for a new trial, and the Court was unanimous in holding that the Chief Baron did not err.

People vs. Stackhouse, 49 Mich., 76.
Hildeburn vs. Curran, 59 Pa. State, 59, 63.

The statement of the witness that the defendant would pay money was but the expression of his opinion to that effect and should not have been received to the prejudice of the defendants.

Hawes having been called to contradict Scott was asked on cross-examination if he had not written to C. E. Cook demanding money, to which the witness answered "Yes": I wrote it because C. E. Cook, in McPherson, Kansas, last March, told me in presence of A. M. Donald, at the hotel, that if I would come to Paris and testify for the defendants he would give me a horse, and that he would see that Chamberlain would give me another. (Record, p. .) The defendants offered Donald and Cook to contradict this statement; but they were not allowed to testify. (Record, p. .)

If it was competent for the witness to give this explanation, it was equally competent, we submit, for the defendants to show its untruthfulness. Without contradiction it was matter very prejudicial to the defendants as to the tending to show an attempt to corrupt witnesses on the part of two of their number. Certainly if it was competent for Haws to testify in contradiction of Scott, it was the right of the accused to inquire of Haws, on cross-examination, whether he had not demanded money of Cook to testify. The question was material for it tended to show that he was a *corrupt* witness. And on his admitting that he had, but explaining that it was because Cook had previously offered him horses to testify for defendants, can it be doubted, that Cook, one of the plaintiffs in error, was entitled to contradict him, by his own testimony, and that of Donald?

VIII.

The Court erred in overruling the objections of plaintiffs in error and admitting in evidence the letter purporting to have been written by the defendants' witness, Elmer McNealey, to S. N. Wood, in regard to being subpœnaed in this case as a witness, as shown of record filed herein (see ninth assignment of error).

This witness had given material evidence for the accused, showing that Bob Hubbard, one of the deceased and one of Cross' party, had made threats against the lives of the defendants. The counsel for the Government then asked the witness if he had not written a letter to S. N. Wood from Liberal, Kansas, asking to be subpœnaed in this case as a witness for the Government. The witness was also shown the letter and the envelope addressed to S. N. Wood, post-marked Liberal, Kansas—to which he answered: "I did not; I have wrote no letter to any one about being subpœnaed." The Government was afterwards permitted to give the evidence of an expert, tending to show that he believed the letter produced to be in his handwriting, and to read the letter to the jury.

It is believed that no authority can be produced sustaining the competency of this testimony. It was not material to the issue. It did not tend to show interest, bias, prejudice or corruption. In Harrington vs. Lincoln, 2 Gray, 133, the Court permitted the contradic-

tion of a witness who on cross-examination denied that immediately after another witness had left the stand he had said to the retiring witness that if he had been cross-examined as he, the retiring witness, had been, he would have said something, even if it had been untrue. This was held to be error. The Court said it was not only collateral, but failed to show bias or prejudice, and at most could only show that the witness so contradicted was a man of incorrect moral views.

In Harris vs. Tippitt, 2 Campbell, 637, *supra*, a witness for the defendant having denied on cross-examination that he had attempted to dissuade a witness examined for the plaintiff from attending Court, it was held that he could not be contradicted. We confidently claim that this testimony was incompetent and prejudicial.

REFUSING TO RECEIVE VERDICT.

IX.

The Court erred in refusing to receive the first verdict of the jury, as stated in the 14th assignment of error.

The Court had instructed the jury:

"If you fail to agree as to any, you may return a verdict as to those convicted, and those you find not guilty, and those you fail to agree upon, naming those defendants you find guilty, those not guilty, and those you fail to agree upon" *(see Bill of Exceptions).*

The jury did return and hand to the Court a verdict exactly in accordance with this instruction, informing the Court that they had agreed upon a verdict. The

Judge read it, but not aloud, so that the defendants, or their counsel, did not know what it was. The counsel for the Government insisted that the verdict should not be received without the consent of the defendants. The Court handed the verdict back to the jury. The counsel for the defendants objected. The Court then, without disclosing what the verdict was, demanded of the counsel for the defendants whether they were willing to receive the verdict. Strange demand! The jury having agreed upon a verdict in accordance with the instructions of the Court, and presented it to the Judge, it was his duty to receive it and record it as the verdict without any demand that the defendants, or their counsel, should consent to anything. The jury having again been sent out, returned the next day a verdict by which four of the plaintiffs in error were found guilty, as to whom there had been a disagreement in the former verdict. The Judge did not refuse to accept the first verdict on the ground that the jury had not deliberated a sufficient length of time, but simply because the defendants, through their counsel, would not consent to that to which the law did not require them to consent. The conduct of the Court in this regard was against law, and resulted in the conviction of four of the plaintiffs in error.

ERRONEOUS CHARGE TO THE JURY.

X.

The Court erred in its charge to the jury, as stated in the Twenty-first Assignment of Error.

The effect of the first part of the above portion of the charge was that if the jury believed that the defendants were present at the killing and believed the additional fact to exist, that they did not aid or encourage the act or know of the unlawful intent of the slayer, in that event the defendants would not be guilty. This was misleading. It implied that the jury should not, in the case put, find the defendants not guilty if present at the killing unless they also believed that they did not aid, etc. This was not the law. It also implied that if they were present, having knowledge of the unlawful intent of the slayer, the jury should not find a verdict of not guilty.

The language was, if they were present but "did not know of the unlawful intent of the party doing the killing, in that event you are instructed that defendants would not be guilty."

It is not the law that if the killing was murder, and the defendants were present and knew of the unlawful intent, they were guilty unless they also aided or encouraged the slayer. They might have acquired a knowledge of the unlawful intent of the slayer from his acts or language, or otherwise, and have been wholly guiltless themselves.

The charge on this point should have been that if the

jury believed that Cross was killed unlawfully and with malice aforethought, by some person or persons, unless they further found that the defendants were present at the killing, and aiding or encouraging it, their verdict should be not guilty. But this would have been materially different from the charge as given.

The effect of the second part of said portion of the charge is, that if the jury found that Cross was killed, and defendants were approaching the stacks, at the time, but did not believe that they did the killing, or acted in connection with those who did, they would not be guilty. This implied that if they were approaching the stacks at the time, in order to find them not guilty, the jury would also have to believe that they did not do the killing, or act in connection with those who did. But the approach to the haystacks at the time, was not in itself criminal, and even if found to be a fact by the jury, it was not necessary that any other fact should be found in favor of the defendants to entitle them to an acquittal.

The charge on this point should have been, that if the jury found that Cross was killed unlawfully, and with malice aforethought, and that defendants were approaching the haystacks at the time, unless the jury should further find that the defendants did the killing in person, or were acting with a common purpose with the slayer or slayers, and were near enough at the time to give them aid if needed, the verdict should be not guilty.

We submit that on the points in question the charge was erroneous, and tended to the prejudice of the defendants below. (*Bill of Exceptions.*)

ERRONEOUS ADMISSION OF LE DAUX'S TESTIMONY.

XI.

The Court erred in admitting in evidence the testimony of Le Daux, as stated in the 6th Assignment of Error.

The declaration admitted in evidence was made two days after Cross was killed, and was as follows: "You people at Vorhies will have to stop feeding the people from Woodsdale, and their horses, when they pass; if you don't we'll come down there and clean up your town and run you out." (Bill of Exceptions.) It was made, as the testimony of the witness Le Daux tended to show, by a part only of the defendants below. It was, as we submit, entirely irrelevant to the issue, and in no manner legally tended to show the guilt of even those who the testimony tended to show made or approved the declaration. It is true the Court said it was admitted only against the defendants below, Donald and O'Connor, who were acquitted. But we contend that it was improperly admitted against them, while it was prejudicial in its effect upon the jury, against all the defendants. Had it been competent testimony against any of the defendants below, its admission, while it might have prejudiced the others, would have been unavoidable in a joint trial. But as it was, as we maintain, incompetent as to all on trial, and prejudicial as to all, we submit that the plaintiffs in error have a right to complain of this action of the Court, as having been injurious to them.

ERRONEOUS ADMISSION OF FOX'S TESTIMONY.

XII.

The Court erred in admitting in evidence the testimony of Taylor Fox, as stated in the 5th and 23d assignments of error.

The admission of that part of the testimony of Taylor Fox (see bill of exceptions), tending to show a forcible interference with those engaged in the removal of the dead bodies of the deceased the day after they were killed to Woodsdale, with no testimony to connect either of the accused with what was done, was error. It must have had an effect upon the jury highly prejudicial to those on trial. It is true the Judge said if the defendants were not connected with it, he would instruct the jury not to consider it (bill of exceptions). Even if this was done, its temporary admission must have been to the prejudice of the accused. And if such subsequent exclusion is relied upon by the Government to cure the error of its admission the Government should be able to show by the record either such exclusion or the existence of the testimony in the case connecting the defendants, or at least some of them, with it. The Record, which contains all the testimony, fails to disclose any making such connection.

The instructions of the Court (bill of exceptions) that the above evidence of the witness Taylor Fox was admitted only as to the defendants William O'Connor and A. M. Donald (who were acquitted), seems to have referred to the testimony of that witness as to

declarations of O'Connor and Donald, the day after the killing, that they were going to kill Wood and Short, and other declarations of O'Connor and Donald (Bill of Exceptions), and not to the testimony of Fox as to the interference with those who were conveying the dead bodies. This view is corroborated by the charge of the Court, upon this point above quoted, wherein the jury were told that "the evidence of Taylor Fox was only admitted to be considered by you with reference to such of the defendants, if any, as were shown to have participated in the acts, by him testified, in so far as the bringing of the dead bodies through Hugoton. * * * If you believe from the evidence that any of the defendants caused said act to be done, then you will consider it only as to such defendants and none others." This instruction seemed to leave it to the jury to determine whether any of the defendants were connected with the act, notwithstanding the fact that there was an entire absence of evidence to show that any of them were so connected. If we are right in this, the Court clearly erred to the prejudice of the plaintiffs in error. For, *the charge of the Court was founded upon a hypothetical state of facts of which there was no evidence.*

U. S. vs. Breitling, 20 How., 252.

XIII.

Defendants were tried and convicted at a term of Court which had lapsed, and there was no jurisdiction or power to hold the term at which the defendants were tried and convicted.

We have been unable to find any legal authority under which Judge PARDEE, Circuit Judge for that U. S. Circuit, could make an order empowering Judge BOARMAN, who was at the time the U. S. District Judge for the Western District of Louisiana, to fill the vacancy caused by the death of Judge SABIN on the 30th of March, 1890, who was at the time of his death the U. S. District Judge for the Eastern District of Texas. We maintain that such order was a nullity, and that Judge BOARMAN was without authority to open the U. S. Circuit Court at Paris, Texas, or to hold it from April 21, 1890, until June 2d, 1890, or for any time, as he assumed to do.

The only provision by which the U. S. Judge of any district can hold a Court in another district, in case of a vacancy in the office of the District Judge thereof, is found in the Revised Statutes, Section 603. But this only authorizes a District Judge of a U. S. District of the *same State* to do so. Sections 591, 592, 593, 594, 595, 596 of the Revised Statutes U. S. do not, nor does either of them, empower the Circuit Judge or Justice to appoint a District Judge, within the same circuit, to hold

Court in a district when the office of Judge thereof is *vacant*. Nor does any other statute that we have found do so.

The *death* of a Judge is not a "*disability*" within the meaning of the statutes.

Ex parte U. S., 1 Gall., 338.

We think that Judge BOARMAN was wholly without authority to open or hold the Paris court during the vacancy, and that his acts in assuming to open and hold, and adjourn it from day to day on and from April 21st to June 2d, 1890, were void. That, in short, the Circuit Court at Paris, for the session provided by law to commence on the 21st day of April, 1890, was never legally opened or continued, in consequence of which it lapsed and failed to exist as a term in which a Judge could sit and have authority and jurisdiction as a court. The manner in which, and the officer by whom, the Circuit Court may be opened and adjourned from time to time, in the absence of the Judges, are provided by Sections 671 and 672 of the Revised Statutes, U. S.

As neither of the Judges of the Circuit Court was present, Judge BOARMAN was without authority, as we maintain. The *Marshal* might have adjourned from day to day to await the appearance of one of the Judges, and if neither of them had attended within four days, he could have adjourned the Court until the next regular session. But the record shows that Judge BOARMAN, not the Marshal, did everything that was done to continue the Court from day to day, which action being void and without effect, the term never had an existence any more than if the law had never provided for a session commencing April 21st, 1890.

The provisions of the above-named sections, 671 and 672, show that a session of a Circuit Court does not open or continue itself without some authorized official action for that purpose. Section 602 of the Revised Statutes supports the foregoing views.

When Judge BRYANT assumed to hold Court on and after the 2d of June, 1890, and to try the accused, the term had irrevocably failed, and could not be made existant by any failure by them to object to being tried, or even by their express consent to be tried, at that time. We assume that no one would claim that one could be legally tried for murder, even by his express consent, except during a term of Court provided for by law.

See *The Alaska*, 35 Fed. Rep., 555.

Our contention has been based upon the ground that there was no term—that it wholly failed. If it be said that Judge BOARMAN was a Judge *de facto*, acting under color of authority, and that the accused did not object to his want of authority, it must be remembered that Judge BOARMAN did not assume to try them. His only part in or toward their conviction, so far as appears by the record, was an attempt to open and continue the session of the Court to await the appearance of the successor of Judge SABIN. The plaintiffs in error, not being on trial before Judge BOARMAN, were in no position to object to anything that he was doing.

Our ultimate positions, then, are :

1. That Judge BOARMAN, although he may have acted as a Judge *de facto*, under color of authority, did not assume to try the plaintiffs in error, and no objection by them to what action he took, it not being directed

against them, was necessary to entitle them to insist that his action in assuming to open and continue the term was a nullity which did not save it from wholly failing; and

2. That when Judge BRYANT assumed to try them, it was when there was no term of the Court in legal existence, and that his action and sentence were not merely voidable, but absolutely void, and incapable of being validated by any failure to object, or even by express consent.

ERRONEOUS CHARGE AS TO PRINCIPALS.

XIV.

The Court erred in its charge to the jury as to what constitutes a principal as shown in the 19th and 20th assignments of error.

THE NINETEENTH ASSIGNMENT of error raises an objection to the charge of the Court in defining a principal. The Court said:

"All persons are principals in the commission of crime if they are present at the time when it is committed, and, knowing the unlawful intent of the party who actually commits the crime, consent, procure, advise or assist in the commission of the same."

In this we think there was error in that it allowed the jury to convict the defendants or any one of them upon mere proof of "consent" to the commission of the offense.

We do not understand that presence and passive

consent would make one a principal in any degree in the commission of a crime. The elementary writers are all agreed that principals may be either in the first or second degree. He who actually commits the offense is said to be principal in the first degree; he who is present aiding and abetting him in doing it is said to be principal in the second degree.

1 Arch. Cr. Pl. & Pr., Pomeroy's Ed., p. 56.
1 Bish. Cr. Law (Fifth Ed.), § 648.

One who does not act and has entered into no conspiracy to commit an offense, but simply stands by without interference while another commits a crime has never been deemed a principal in any degree. It may have been the duty of such a person to interfere to prevent a crime, but such offense would not make one principal or criminally responsible for the crime which may result; unless for misprison of felony, which is a separate and distinct offense and not covered by the indictment in the present case.

1 Bish. Crim. Law, Fifth Ed., § 604.

To make one a principal in the second degree, there must be participation in the act; though a man be present whilst a felony is committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be principal in the second degree, merely because he did not prevent the felony.

1 Hale, 439.
Foster Pl. Crown, 350.
State vs. Hildreth, 9 Iredell, 440.

It is necessary, in order to have that effect, that *he*

should say or do something showing his consent to the felonious purpose, and contributing to its execution.

State vs. Hildreth, 9 Iredell, 440.
U. S. vs. Jones, 3 Wash. C. C., 223.
Connaughty vs. The State, 1 Wis., 159.

In the present case, it appears that one or more of the numerous defendants did the shooting resulting in Cross' death. The other defendants, without any previous knowledge of such intention on the part of the perpetrators, could, under the erroneous charge of the Court, be held as principals for "consenting," although such consent was evidenced by no act or word contributing to the execution of the offense. This was misleading at best; the Court should have qualified the charge by defining consent and adding that such consent must not be merely passive, but active and in aid of the criminal purpose of the principal.

THE TWENTIETH ASSIGNMENT OF ERROR raises questions kindred to the nineteenth just considered, and is as follows:

"By the term 'present' as above used, is not meant that each of the defendants must have been actually and physically at the place and at the time John M. Cross was killed; but if they were near the place when and where the crime was committed and knew of the criminal intent of the person or persons who actually did the killing and were there for the purpose of aiding in the commission of the crime by acts if occasion demanded, or for the purpose of encouraging by their presence the person or persons so committing said crime, though so acting, would be legally present at the commission of the offense and would be principals in the commission; or if the defendants were at such a distance that they could not aid in actual commis-

sion of the offense but at the time the offense was committed they were doing some act in the furtherance of the criminal design to take the life of John M. Cross, then such persons would also be principals."

We think this charge open to serious objections. It is here charged that the defendants might be convicted if "near the place when and where the crime was committed," and aiding in the commission of the criminal act, etc. It seems perfectly well settled that no one can be held as a principal in felony in any degree unless the proximity to the place where the crime is committed is such that he can afford aid should the occasion demand it. He must be sufficiently "near" for that purpose, otherwise he is not a principal, although doing some act in furtherance of the common criminal design.

Wharton on Homicide (Second Ed)., § 337.
1 Arch. Cr. Pl. & Prac. (Pomeroy's Ed.), p. 56.
1 Bish. Crim. Law, 5th Ed., § 653.

We think, further, that there was error in charging that, if defendants were at such a distance that they could not aid in the actual commission of the offense, but were then doing some act in furtherance of the criminal design to take the life of John M. Cross, then such persons would be principals.

We are wholly unable to find an elementary writer or decision to sustain this view. Presence, actual or constructive, is essential to constitute one a principal, except in the case of poisoning and the use of some irresponsible agent by the defendant. In such cases the person acting is a principal in the first degree,

though not present at the time the homicide is accomplished.

Wharton on Homicide, 2d Ed., §§ 326–327.

Where, however, a homicide is comitted by shooting, as charged in the present case, principals must be sufficiently near to render any needed assistance.

See authorities above cited.

Those not so present might be indictable as accessories, but could not be convicted as principals, although acting in pursuance of a previous plan to commit the offense. If too remote to render needed aid at the time when the offense is committed, they could not be convicted under the present indictment.

Wharton on Homicide, 2d Ed., § 337.
1 Wharton's Crim. Law, 6th Ed., § 126.

If we are right in these views, the charge was highly prejudicial to the defendants. The testimony shows that the defendants in approaching the hay camp—the scene of the homicide—were considerable distances apart, in different vehicles. Under the Court's instructions, defendants could be convicted if the jury found a common criminal purpose, although defendants were miles from the scene. They still might be "near" in the estimation of the jury, or doing some act in furtherance of the criminal design to take the life of Cross. Indeed, we think it highly probable that the jury must have taken this view, for the record discloses that the defendants on trial were remote from the scene of the shooting. At least, they gave testimony supporting

this claim, and it was error to permit their conviction without finding that they were "present" at the offense as that term is defined in law.

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WM. R. DAY,
JOSEPH FREASE,
For Plaintiffs in Error.

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Of Counsel.

Office Supreme Court U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1890.

C. E. COOK, O. J. COOK, CYRUS FREASE, J. B. CHAMBERLAIN, JOHN JACKSON, and J. LAWRENCE, plaintiffs in error,
vs.
THE UNITED STATES.
No. 1311.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR THE UNITED STATES.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR THE UNITED STATES.

THE CASE.

This is a writ of error sued out to a judgment imposing a sentence of death pronounced in the circuit court for the eastern district of Texas upon the six plaintiffs in error, for murder charged to have been committed in July, 1888, in that strip of land lying between Kansas on the north, Texas on the south, and between the one

hundredth and the one hundred and third meridians of longitude west of Greenwich, which will be referred to in this brief as the Neutral Strip.

The record has been examined with the care required by the importance of the case. We are compelled to confess error and to consent to a reversal of the judgment for a new trial. It is due to the court and to ourselves that the reasons upon which this action is based should be stated.

CONFESSION OF ERROR.

The admission of the report of the Attorney-General of Kansas upon the murder, and the charge of the court to the jury with respect to the effect thereof, were error prejudicial to the defendants below.

In order to understand the prejudicial effect of the error to be stated, it will be necessary to briefly present the case as made out by the Government witnesses, and the exact issue of fact raised by the evidence adduced on behalf of the defendants.

Stevens County, Kansas, was on the southern border of that State and adjoined the Neutral Strip. It had been recently organized. The homicide grew out of a bitter rivalry between the towns of Woodsdale and Hugoton in this county. Voorhees, the third town of the county, sided with Woodsdale in county controversies. Hugoton was near the center of the county; Woodsdale was near its northern boundary and Voorhees near the State line. A question arose as to voting bonds for a railroad. Woodsdale and Voorhees favored the issuing of bonds because the road, as projected, was to pass through both towns,

while Hugoton, which would be several miles from it, was opposed to an expenditure for such a purpose. At a county meeting, called to consider the question, Robinson, the city marshal of Hugoton, in a quarrel with a partisan of Woodsdale, discharged his pistol. Thereafter Short, a constable from Woodsdale, went to Hugoton with the intention of arresting Robinson. A fight occurred, many shots were exchanged, and Short, with two companions, was driven out of Hugoton.

A few days after this, in July, 1888, Robinson went, in a party of Hugoton people, into the Neutral Strip to fish. Short heard of it, and taking three men with him, followed and caught up with them, and demanded that Robinson be delivered into his custody. During a parley, Robinson escaped, and Short pursued him. Short had meantime sent word to Cross, the sheriff of Stevens County, who lived at Woodsdale, asking that additional aid be sent him. Robinson's companions, too, sent news of his situation to his friends in Hugoton. An armed party of men started out from Hugoton at once. Short, the constable, and the men whom he had with him, after chasing Robinson some distance, gave up the pursuit and were on their way back to Woodsdale when they met the first Hugoton relief party. Shots were exchanged, but Short and his men escaped. This Hugoton party continued down into the Strip, but not finding Robinson, returned home.

Meantime Sheriff Cross, on receiving word from Short, took four men with him and hurried down into the Strip, but did not meet either Short, the first Hugoton relief party, or Robinson. Returning, he reached what was known as

"Wild Horse Lake" in the Strip about 9 o'clock at night. The lake was a depression which contained no water in the summer, but its bed was covered with grass which three hay-makers were cutting. Cross and his party staked their horses near the hay-camp, left their saddles and guns near the horses, and lay down to rest in the camp at the foot of some hay-stacks which were there.

Robinson, returning to Hugoton, had passed the hay-makers' camp some three or four hours before Cross's party reached it. Whether he had knowledge of the whereabouts of Cross and his men was a subject of dispute. On his way north to Hugoton he stopped at the house of a man named Mayher, where he met a second Hugoton relief party, which included all of the plaintiffs in error. Robinson turned back with this party, and went down into the Strip. They reached the hay-makers' camp about 12 o'clock at night. The evidence for the Government was that they came upon Cross and his men as they were lying upon the ground, and demanded that they hold up their hands. Chamberlain, one of the plaintiffs in error, and Robinson, then proceeded to shoot each of the Cross party as he stood with his hands uplifted and unarmed. (It should be stated that Robinson was not arrested and put upon trial because he could not be found when the plaintiffs in error were apprehended.)

Herbert Tonney, a youth, and a witness for the Government, was one of the Cross party. He was shot in the shoulder, and fell as if dead. The other four were shot again as they lay upon the ground. Tonney escaped the second shot, and was the only one of the Cross party who

survived. The guns of Cross and his men were taken by the Hugoton party.

Such was the case for the Government, made by the evidence of Tonney and one of the hay-makers, and supported by many circumstances. Three of the defendants took the stand, and their statement, corroborated in many respects by two of the hay-makers, was that none of those who are here now as plaintiffs in error were present at the killing; that they were driving in buggies toward the hay-making camp, and were a mile away from it, when they heard fifty or sixty shots fired; that upon coming up to the camp they saw horsemen riding away from the camp, and found the dead bodies of Cross and his men lying at the foot of the haystacks.

In rebuttal the Government called a Mr. Bradford, who was of counsel for the defendants, and who had been attorney-general of Kansas. (Rec., p. 27.) As attorney-general, he had been sent down by the governor of Kansas to Stevens County to make a report upon the homicide immediately after its occurrence. Counsel for the Government asked him whether he had made a report. He said he had. He was asked whether the defendants, or any of them, had made to him the statements with reference to the killing which were credited to them in the report. He stated that the report was made up from hearsay evidence, and was thrown together hastily by his stenographer; that it did not refresh his recollection; that it was incorrect, and that the defendants had not made the statements therein credited to them. (Rec., pp. 27–38 inclusive.) Thereupon counsel for the Government offered in evidence from

the report certain passages of which the following were the most important (Rec., p. 39):

> I interviewed the two Cooks, Sam Robinson, and various other persons. The Cooks are very determined. They insist that the Woodsdale fellows were at fault. They admit that they were with the party that did the shooting. They say the shooting was in self-defense; that they were fired upon. This statement was agreed to by all parties who were with the Hugoton party who did the shooting. * * *
>
> The Hugoton party all agree in one statement, as I have before stated, that they themselves were intending to camp at the hay camps, and that when they approached the hay camp for the purpose of going into the camp they were fired upon by the Woodsdale parties—the sheriff's posse—and that they returned the fire and killed Sheriff Cross and the three other men, and wounded the boy. * * *
>
> Cook's party of the Hugoton faction say they were fired on from this little stack; and when I asked them why it was that none of the Hugoton party were injured in this affray, they insist that it must have been because Cross and his men fired over the top of them. Cook agrees that they dismounted from their horses and got out of their buggies as they approached the stacks; and maintains that they fought in self-defense.

Objection was made to the introduction of these extracts from the report on the ground that they were hearsay, and for many other reasons, and exception was duly taken to their admission. (Rec., p. 40).

The record states that the parts of Attorney-General Bradford's report admitted in evidence were neither offered nor admitted as a public document, but to show that wit-

ness had made different statements at another time and place. (Rec., p. 40). When the judge came to charge the jury, however, he said (Rec., p. 51):

> The instructions given above are limited so far as the evidence is concerned by the following instructions:
>
> The portions of Attorney-General Bradford's report were admitted in evidence to be considered by you as to whether or not the statements therein contained were made by the parties to said Bradford, said Bradford now being the attorney for the defendants, and denying the truth of the statements therein contained; and as to whether or not these statements were ever made to said Bradford is a question of fact to be considered by you from all the evidence upon that subject; and if you believe the statements were not so made to said Bradford, you are to disregard the same. But if you believe from the evidence that they were so made to said Bradford, then you are instructed to so consider them as evidence, but only as to such parties by whom they were made.

It will be seen from the foregoing that the Government was permitted to contradict its own witness by introducing a written statement signed by him, made at another time, and that this was done without any professional statement to the court by counsel for the Government that they were surprised and misled into calling him. Such a course is contrary to all the rules of evidence.

It has sometimes been permitted to counsel who has been surprised by the evidence of his own witness, and so informs the court, to introduce evidence of former statements of the witness upon which he relied in offering him. (1

Greenleaf on Ev., sec. 444.) This practice, however, in criminal cases is not sustained by the weight of authority. (*State* vs. *Hurley*, 46 Ohio State, 322.) It can only be justified in any event when counsel have been trapped into injuring their case through the evidence of a witness unexpectedly adverse. Here there was no trap, for there is nothing to show that the counsel for the Government had not ample knowledge of what the evidence of Bradford would be.

But whatever may be the view of the court upon the admission of the report, it clearly had no bearing except upon the weight and credibility to be given to Bradford's testimony. The court charged that it might be considered by the jury as substantive evidence that the defendants made the statements therein credited to them. Admissions of defendants would be substantive evidence of the facts admitted. The effect of the charge, therefore, was that the report of the attorney-general of Kansas was substantive evidence that the defendants (and all of them, for the report covers all of them) were present at the killing and engaged therein. The only real issue of fact on the evidence was, as we have shown, narrowed to the question whether or not the defendants were present at the killing, and this report was allowed to be considered by the jury as evidence that they were. It is not necessary to discuss the question whether the charge above quoted is erroneous. It is grossly so, and must have been very prejudicial. It was the admission of the purest hearsay evidence upon the crucial point in the case.

THE INDICTMENT.

Defendants below moved in arrest of judgment, because among other things, the indictment did not charge the crime of murder, in this, that it did not allege that the wounds inflicted by the defendants caused Cross's death. (Rec., p. 60.) The indictment (Rec., p. 7) charges that the defendants made an assault upon and shot into the body of Cross, "inflicting thereon two mortal wounds; the said John M. Cross then and there did languish and languishing did die." A conclusion follows, beginning "And so the grand jurors aforesaid do present and say," etc., in which it is charged that the defendants, with the deadly weapons before mentioned, and with malice aforethought, etc., did "kill and murder the said John M. Cross."

Whether the causal connection between the wounds and the death can be inferred from the language of the indictment with the certainty required by the common law in indictments for murder, and whether the defect in the statement is cured by verdict, are questions which we submit to the court without argument or the expression of an opinion.

We do not consider any other of the many errors assigned except that based upon want of jurisdiction, because they involve questions not certain to arise in the new trial, which we believe to be required by the error of the court in regard to the Bradford report.

THE QUESTION OF JURISDICTION.

The judgment of the court below may be reversed for the foregoing reasons without deciding the question of jurisdiction raised upon the record by the plaintiffs in error. (Record, pages 59 and 70.) This court can not order a new trial, however, without meeting the question and deciding it. The contention is that there is no jurisdiction either in the court below or in any other court to try the plaintiffs in error for the crime charged. If this is well founded, they are entitled now to an order discharging them. Moreover it is of the utmost importance to the Government and to them that the enormous expense incident to a new trial be avoided, if it is true that no court has power to try them. This court should, therefore, consider and decide whether there is jurisdiction in the court below, or in any court of the United States.

ARGUMENT.

Coming to the question of jurisdiction the contention on behalf of the Government is:

(1) That the court below had jurisdiction to try the plaintiffs in error.

(2) That, if the court for the eastern district of Texas did not have jurisdiction, then the court for the northern district of Texas had it.

(3) That if neither of the Texas courts had power to try the accused, then jurisdiction was in the circuit court for the district of Kansas.

I.

THE COURT BELOW HAD JURISDICTION TO TRY THE PLAINTIFFS IN ERROR.

The claim on behalf of the plaintiffs in error is, first, that the act approved March 1, 1889, entitled "An act to establish a United States court in the Indian Territory, and for other purposes" (chap. 333 of the second session of 1889, 25 Stat. L., 783), under which the jurisdiction of the court below was asserted, does not confer jurisdiction to punish the crime here charged, which was committed before the passage of the act; and, second, that even if the act attempts to confer such jurisdiction, it is unconstitutional.

These will be considered in their reverse order.

The first question then is whether Congress has power under the Constitution to pass an act fixing or changing the place of trial for a crime committed, before the act, in territory, outside of a State, over which the United States has exclusive jurisdiction.

The last clause of section 2 of Article III of the Constitution is as follows:

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trials shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Article VI of the Amendments to the Constitution provides that—

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article I, section 9 of the Constitution provides that no bill of attainder or *ex post facto* law shall be passed.

These are the only restrictions in the Constitution that can possibly have application here.

A.

The sixth amendment has no application to this question.

It has been decided in *United States* vs. *Dawson* (15 Howard, 467) that Article VI of the amendments to the Constitution has no application to any crimes not committed in a State. As the crime here was not committed in a State, the sixth amendment requires no further consideration.

B.

A change of the place of trial after the crime is not ex post facto.

Nor is a law changing the place of trial an *ex post facto* law. It was decided in *Gut* vs. *Minnesota* (9 Wall., 35) that—

> A law of a State changing the place of trial from one county to another county in the same district, or

> even to a different district from that in which the offense was committed, or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment. An *ex post facto* law does not involve, in any definitions, a change of the place of trial of an alleged offense after its commission.

The opinion in *Gut* vs. *The State* was delivered by Mr. Justice Field, and was concurred in by Mr. Justice Miller, two of the judges who made up the majority of the court in the decision of *Kring* vs. *Mo.* (107 U. S., 221), the case which is relied on by counsel for the plaintiffs in error as an authority to show that a change of the place of trial after the commission of the offense is an *ex post facto* law.

The principle laid down in the Kring Case was that any law enacted after a crime, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage, is *ex post facto*. The Kring Case does not overrule *Gut* vs. *State*, which was decided by a unanimous court. It follows, therefore, that a change of the place of trial does not in legal contemplation alter the situation of the accused to his disadvantage. *Gut* vs. *The State* has exact application to the question we are discussing, and settles conclusively that if the act of March 1, 1889, conferring jurisdiction on the court for the eastern district of Texas was intended to affect the prosecution of crimes committed before the act, it was not unconstitutional on the ground that it was an *ex post facto* law.

C.

A change of place of trial after the crime is not in violation of Article III, section 2.

Nor would the act so construed be in violation of the clause quoted above, from Article III, section 2 of the Constitution. "When not committed within any State the trial shall be at such place or places as the Congress may by law have directed." Grammatically, the perfect tense in the words "have directed" is to be taken in connection with the word "trial," because that is the nearest word in the sentence to which, with respect to time, the tense of the verb may have reference. In the sixth amendment, upon which plaintiffs in error rely by way of analogy, and which has been construed by the court to mean that the district shall be ascertained before the commission of the offense, the construction of the sentence is very different. The provision is that the accused shall have his trial in the district wherein the crime shall have been committed, which district shall have been previously ascertained by law. The future perfect tense in the second of the two clauses follows immediately the clause with respect to the crime, and the sense of it grammatically, therefore, is determined by reference to the time of the crime rather than by reference to the time of the trial.

Reliance is also had by plaintiffs in error on the history of this clause of the second section of the third article in the constitutional convention. The Constitution of course was not adopted by the convention as a finality. It had to be submitted to the vote of the States. The course of

amendments in the constitutional convention, therefore, can hardly furnish a weighty argument as to the proper construction to be put upon the clause. But even from the history of the clause, the plaintiffs in error can derive no aid. The section as it appeared in the original draught submitted to the constitutional convention for amendment and discussion was section 4, Article XI, and read thus:

> The trial of all criminal offenses, except in cases of impeachments, shall be in the State where they shall be committed, and shall be by jury. (Elliott's Debates on the Constitution, vol. 1, page 229.)

The section was amended by the convention when it was reached in due order, and read as follows:

> The trial of all crimes, except in cases of impeachments shall be by jury, and such trials shall be held in the State where the said crimes shall have been committed, but when not committed within any State then the trial shall be at such place or places as the legislature may direct. (Elliott's Debates, vol. 1, page 270.

Mr. Madison, speaking of this amendment. (Madison Papers, Supplement to Elliott's Debates, vol. 5, page 484), says:

> The object of this amendment was to provide for trial by jury of offenses committed out of any State.

(See also *Callan* vs. *Wilson*, 127 U. S., 540–550.)

This would seem to confine the purpose of the amendment to securing the right of jury trial and not to justify any inference that it was intended thereby to require a fixed place of trial before the crime.

On September 8, 1787, the journal of the convention shows that—

> It was moved and seconded to appoint a committee of five to revise the style of and arrange the articles agreed to by the house; which passed in the affirmative. And a committee was appointed by ballot of the Hon. Mr. Jackson, Mr. Hamilton, Mr. G. Morris, Mr. Madison, and Mr. King. (Elliott's Debates, vol. 1, page 295.)

The revised draught was reported September 12, 1787, changed in one particular,—that is, the clause, "as the legislature may direct," was changed into its present form, "as the Congress may by law have directed." This committee was appointed, as we have seen, merely *to revise the style* of the articles as voted upon, and not to change the sense. The journals do not show that the attention of the convention was ever called to the alteration, a fact which is strong evidence that no amendment in meaning was thereby intended. The change from the "may direct" to "may have directed" has no more significance, therefore, than the change of the words, "the legislature," to "the Congress." It was a change of style, upon which no argument as to meaning can be based.

The makers of the Constitution had before them two classes of crime to provide for; one was local crimes—crimes committed within a State; and the other was crimes committed outside of a State, and within the exclusive jurisdiction of the United States. With respect to the first class, it was determined to secure, as near as might be, the old common-law privilege of a trial in the neighborhood of the place of the crime, before a jury of the vicinage, by

requiring that it should be had in the State where committed. The provision for local crimes does not seem to have satisfied the States, and the sixth amendment was passed to secure trial within the district in which the crime was committed, as fixed at the time of the commission of the crime.

It was, in the nature of things, impossible, however, to provide in the Constitution for the place of trial of crimes not within any State or fixed territorial jurisdiction, and therefore the whole subject was left to Congress.

The hardship, if it be one, arising from a trial many miles distant from the place of the crime, is unavoidable, and proceeds either from the impossibility of having an adequate tribunal in every ship on the high seas, or from the necessary difficulty which the Government finds in providing territorial courts for remote and sparsely settled regions within its domain.

One of the first acts of Congress, in 1790, was to make the provision which is now section 730 of the Revised Statutes, "The trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought." Instead of fixing the district definitely, Congress left it to the captor of the accused to determine in what court the man shall be tried, for he may, of course, determine into what district he shall first bring his prisoner. The validity of this provision has never been questioned. Under it, men have been tried for murder and hanged for a crime committed half way round the globe from the district in which they were tried. Can

it be said that Congress is not as much to be trusted in fixing a place for trial after the crime as the captor of the criminal?

This section was a contemporaneous construction of the power of Congress under Art. III sec. 2, in fixing the place of trial of non-local crimes which is very significant of the complete control vested in Congress over the subject. It would certainly not seem unreasonable to infer that if Congress can delegate to the captor of the criminal power to determine the place of trial after the crime, it may itself exercise such power.

Our conclusion as to Art. III, sec. 2, is sustained by cases decided in this court. In *United States* vs. *Dawson* (15 How., 467), Mr. Justice Nelson said (page 488):

> A crime, therefore, committed against a law of the United States, out of the limits of a State, is not local, *but may be tried at such place as Congress shall designate by law.*
>
> This furnishes an answer to the argument against the jurisdiction of the court, as it respects venue, trial in the county, and jury from the vicinage, *as well as in respect to the necessity of particular or fixed districts before the offense.*

Again, in *United States* vs. *Jackalow* (1 Black, 486), the same learned justice says:

> Crimes committed against the laws of the United States out of the limits of a State are not local, but may be tried at such place as *Congress shall designate by law*, but are local if committed within the State. They must then be tried in the district in which the offense was committed.

The use of the future verb in the expression "as Congress shall designate," in the language quoted, shows that the designation need not take place before the commission of the offense, but only before the trial. But still more significant is the intimation contained in the last clause of the quotation from *United States* vs. *Dawson*, that there is no necessity for fixed districts before the offense when committed out of a State. The *semble* by District Judge Johnson in *United States* vs. *Starr* (Hempstead, 469), was not required by the case which he had before him, and can not be considered authority. The view taken here is supported by the opinion of Judge Parker, unreported, in the case of *United States* vs. *Martin*, a full report of which is to be found in Mr. Peck's brief for the plaintiffs in error. Judge Parker's intimation was not necessary, it is conceded, to the case which he had before him. It is a conflict of two *obiter dicta* therefore. The decision in Hempstead was prior in point of time to the decisions in *United States* vs. *Dawson*, and *United States* vs. *Jackalow*.

D.

The act of March 1, 1889, *provided a jurisdiction to try crimes committed in the Neutral Strip before its passage.*

The jurisdiction of the court below was asserted under the act of March 1, 1889, chap. 333 of the laws of that year (25 Stats. 783–788).

The 1st section provides that—

> A United States court is hereby established, whose jurisdiction shall extend over the Indian Territory, bounded as follows, to wit: north by the State of

> Kansas, east by the States of Missouri and Arkansas, south by the State of Texas, and west by the State of Texas and the Territory of New Mexico:"

and that a judge shall be appointed by the President for the term of four years.

The 5th section provides that—

> The court hereby established shall have exclusive original jurisdiction over all offenses against the laws of the United States committed within the Indian Territory, as in this act defined, not punishable by death or by imprisonment at hard labor.

The 6th section confers jurisdiction upon the court in all civil cases between persons when both of them are not of Indian blood, when the value of the thing in controversy is $100 or more, and of litigation over coal-mining leases, made by the civilized Indian tribes. It also provides that the civil procedure shall conform to the Arkansas practice, and that the Supreme Court may review any case in which the thing in controversy exceeds $1,000.

The 17th section provides that the Chickasaw Nation and a portion of the Choctaw Nation therein described,

> And all that portion of the Indian Territory not annexed to the district of Kansas by the act approved January 6, 1883, and not set apart and occupied by the five civilized tribes, shall, from and after the passage of this act, be annexed to and constitute a part of the eastern judicial district of the State of Texas for judicial purposes.

The portion of the Indian Territory annexed to the district of Kansas by the act of January 6, 1883, is found on

page 400 of vol. 22, Statutes at Large, and is described in section 2 of that act as—

> All that part of the Indian Territory lying north of the Canadian River and east of Texas and the one hundredth meridian not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes.

Section 18 of the act of March 1, 1889, provides:

> That the counties of Lamar, Fannin, Red River, and Delta, of the State of Texas, and all that part of the Indian Territory attached to the said eastern judicial district of the State of Texas by the provisions of this act, shall constitute a division of the eastern judicial district of Texas. * * * *And the United States courts herein provided to be held at Paris shall have exclusive original jurisdiction of all offenses committed against the laws of the United States within the limits of that portion of the Indian Territory attached to the eastern judicial district of the State of Texas by the provisions of this act, of which jurisdiction is not given by this act to the court herein established in the Indian Territory;* and all civil process issued against persons resident in the said counties of Lamar, Fannin, Red River, and Delta, cognizable before the United States courts, shall be made returnable to the courts, respectively to be held at the city of Paris, Texas; and all prosecutions for offenses committed in either of said last-mentioned counties shall be tried in the division of said eastern district of which said counties form a part: *Provided, That no process issued, or prosecutions commenced, or suits instituted before the passage of this act shall be in any way affected by the provisions thereof.*

The foregoing are all the sections affecting in any way the jurisdiction conferred by the act.

The 28th section, the last in the act, repeals all laws or parts of laws inconsistent therewith.

The purpose of this act was to confer the jurisdiction to try minor offenses and misdemeanors committed in the Indian Territory, upon the new court which the act established, and to divide the jurisdiction to try felonies between the United States courts for the western district of Arkansas, the district of Kansas, and the eastern district of Texas. The Kansas court was given that part of the Indian Territory lying east of the 100th meridian and north of the Canadian River, less the territory occupied by the Creeks, Cherokees, and Seminoles. The Texas court was given all the rest of the Indian Territory as defined by the act except the territory occupied by the Creeks, Cherokees and Seminoles, and the south part of the territory of the Choctaws. The Arkansas court retained jurisdiction to try felonies in the country occupied by the Creeks, Cherokees, Seminoles, and in the northern half of the country of the Choctaws. The Indian Territory, as defined in the act, was bounded on the north by Kansas, on the east by Missouri and Kansas, on the south by Texas, and on the west by New Mexico and Texas.

The description necessarily includes the Neutral Strip, because New Mexico touches no part of Indian Territory unless the strip is properly a part of the Territory. The strip lies west of the 100th meridian and is not occupied by any of the five civilized tribes. It is, therefore, not in the jurisdiction assigned either to the Kansas court or to the Arkansas court, and, being a part of the Indian Terri-

tory as defined in the act, falls within the residue clause describing the jurisdiction of the eastern court of Texas—the court below.

One of counsel for the plaintiffs in error contends that Congress in describing the bounds of "the Indian Territory" made a mistake in its geography and really did not intend to use New Mexico as a bound at all. This claim is based chiefly on the further claim that until this time the Indian Territory had not included the strip; and, second, on the omission to use as an additional northern bound, the State of Colorado, which adjoins the Strip for some 30 miles on the north.

We deny that the Strip has not always been part of Indian Territory, since that term came to have definite meaning as a geographical description, and shall discuss the question at length at another part of this brief. For the present it is unnecessary.

It hardly needs argument to establish that the definite description by bounds must control a general expression like "the Indian Territory." These bounds are mentioned for the express purpose of definitely fixing the territorial jurisdiction of a court. The fact, even if it were a fact, that Indian Territory did not include the Strip, has no relevancy in the construction of this statute. Instead of decreasing the jurisdiction conferred by the act the result is to amplify the meaning of the term "Indian Territory," if it be true, which we deny, that its previous geographical signification would not include the Strip.

Nor is the omission of Colorado as a northern bound important. The north line of the Territory, including the Strip, is entirely on the thirty-seventh parallel. Kansas's

southern line is identical with it for so much of its length that the failure to mention Colorado could leave no uncertainty. Such an omission could easily have been made by inadvertence. But what possible explanation could there be for a mistake in bounding a judicial district by which for the western boundary there should be named a territory nearly two hundred miles from the district sought to be described? The claim calls for no further consideration.

E.

The act of March 1, 1889, *must be construed to apply to the prosecution of offenses committed, but not prosecuted, before its passage.*

Reliance is had by our adversaries in construing the act under which jurisdiction is here asserted, upon the general rule that a court will never give to a statute retrospective operation unless this is expressly required or necessarily implied by its terms. The general rule is admitted, but we avoid its effect in three ways:

First. In no proper sense is the application of the provisions of the act to crimes committed before its passage a retrospective operation.

Second. If this is a retrospective operation, then such construction is warranted by the exception to the rule relied upon, namely, that remedial statutes shall have retrospective operation.

Third. Conceding that the rule against retrospective constructions has full application here, the language of the proviso as to the operation of the act gives rise to an implication, as strong as if it had been express, that the act must affect crimes committed before its passage.

First. The act, so far as concerns the crime under discussion, does not attempt to define it. It will not be disputed that section 5339, providing that "Every person who commits murder * * * within any fort, arsenal, dockyard, magazine, or any other place or district of country under the exclusive jurisdiction of the United States, * * * shall suffer death," was in force in the Strip when this homicide occurred. (*Jones* vs. *United States*, No. 1143, Oct. Term 1890.) If the plaintiffs were guilty, as charged, they had committed a crime denounced, and were liable to a penalty prescribed at the time of their acts. An act providing a court for prosecuting them did not change the crime or the punishment; it only defined a prosecution to take place after the enactment.

It operated not upon the crime but the procedure for punishing it. As no procedure had been invoked in the case of this crime before the act its operation was wholly prospective, though the ground for the prosecution was prior in time to the act. An act providing a procedure is only retrospective in its operation when it affects pending prosecutions. Who would call an act retrospective in its operation which established a court to hear civil cases because under it suits could be brought to enforce rights accruing before the court was established? The language used in the act is jurisdiction of "all crimes committed." Conceive a court created to hear and decide suits brought for all "torts committed" or "contracts broken." Could it be contended that it would give such an act a retrospective operation to hold that suits might be brought for torts and breaches of contract on which causes of action accrued before the passage of the act? Does not this very

act confer upon the new Indian Territory court jurisdiction to hear suits brought upon causes of action arising before its passage? Is that retrospective operation? Why then is its application to prosecutions of crimes committed prior to that time retrospective? The jurisdiction of the new court and the court of Eastern Texas can not be distinguished in this respect.

The right of the Government to prosecute accrued before the passage of the act, and the right was not affected by the act. Now, we have shown that a change of the place of trial, and of the court is not forbidden by the Constitution, because, in legal contemplation, they do not prejudice the accused. The act in question only makes such a change. The power to change to this extent is, therefore, as free in criminal cases of this nature as in civil cases. The analogy between crimes and causes of actions is, then, a correct one. As it would not be giving an act of civil procedure retrospective operation to apply it to causes of action theretofore arising, so it does not here give the act of March 1, 1889, a retrospective operation to permit prosecutions under it of crimes committed before its passage, when no prosecution therefor has been begun.

It is respectfully submitted that the foregoing is fully supported by and is no more refined than the view taken by this court in the case of *Railroad Company* vs. *Grant* (98 U. S., 398). In that case the question was whether an act raising the minimum limit of value required in the subject of controversy to permit this court to examine cases brought from the supreme court of the District of Columbia, and repealing all inconsistent acts, affected the power of the court to re-examine a case in which this court

had already taken jurisdiction by writ of error which was sued out and returned four years before the amending and repealing act, but which had not been heard.

Said Chief-Justice Waite (page 401):

> The act of 1879 is undoubtedly prospective in its operation. It does not vacate or annul what has been done under the old law. It destroys no vested rights. It does not set aside any judgment already rendered by this court under the jurisdiction conferred by the Revised Statutes when in force. But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary. The Revised Statutes gave parties the right to remove their causes to this court by writ of error and appeal, and gave us the authority to reëxamine, reverse, or affirm judgments or decrees thus brought up. The repeal of that law does not vacate or annul an appeal or a writ already taken or sued out, but it takes away our right to hear and determine the cause, if the matter in dispute is less than the present jurisdictional amount. The appeal or the writ remains in full force, but we dismiss the suit, because our jurisdiction is gone.

Second. But even if operation by the act to permit prosecution of crimes would be retrospective, the act is simply remedial, and retrospective operation in remedial acts is a favored construction. The necessary conclusion from *Gut* vs. *The State* that a change of the place of trial is not *ex post facto*, completely divorces the procedure here from the crime. It destroys the distinction for the purposes of

this discussion between crimes and causes of civil action. The act is purely remedial, then, and rules of construction applicable to such statutes will apply.

Said Baron Wilde (afterwards Lord Chancellor Truro) in *Wright* vs. *Hale* (6 H. & N., 227):

> The rule applicable to cases of this sort is that, when a new enactment deals with rights of action, unless it is so expressed in the act an existing right of action is not taken away; but where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the act.

In this case, an act provided that—

> When a plaintiff in any action for an alleged wrong recovers by the verdict of a jury less than £5, he shall not be entitled to any costs if the judge certifies to deprive him of them.

It was held that a judge might so certify in an action pending when the act was passed. This case was followed in *Kimbray* vs. *Draper* (L. R. 3 Q. B., 160), and reference is made by the judges in this case to two others in which it had been held that a statute providing that "in every action brought" by an executor the plaintiff should be liable to costs, etc., applied to actions brought before the statute was passed.

This expression "in every action brought" is not unlike the phrase used in the act here involved "of all crimes committed." The past participle was there held to mean "heretofore or hereafter brought." *Freeman* vs. *Moyes* (1 A. & E., 338); *Grant* vs. *Kemp* (2 C. & M., 636.)

In *Larkin* vs. *Saffrons* (15 Fed. Rep., 150), the question was, whether the power of the circuit court to entertain certain civil suits conferred by an act of Congress affected pending litigation, or whether it should only operate to permit suits brought in the future. The question there, as here, was one of jurisdiction.

Judge Hammond, in an opinion on the whole subject of the retrospective construction of statutes, remedial and otherwise, uses the following language with reference to the objection that the act there in question could not affect pending suits:

> The plea protests against the power of the court to act in the premises; it says this suit should not be entertained here because this court has not been empowered to try it. But the very non-existence of the power to hear it may be the strongest reason why the legislature should determine to confer it, and render this defense, if it may be called so, nugatory. Certainly nothing could be more appropriate than for Congress to confer on its own courts power to hear controversies arising out of its own laws, as the Constitution has expressly authorized it to do; and I can not see how any citizen can acquire a vested right in any omission of Congress to do this, nor why the rule of construction should not be, by analogy to that above mentioned, to apply the act to pending cases, unless there be an express direction to the contrary.

This language has especial application in view of the claims of counsel here that there never has been any court with jurisdiction to try offenses committed in the Strip until the act of March 1, 1889.

Third. We are not left, however, to the application of general rules of construction to the language conferring jurisdiction in this statute to reach the conclusion we contend for. It is reached by the necessary implication arising from the proviso of the 18th section. The proviso is as follows:

> Provided that no process issued, or *prosecution commenced*, or suit instituted, before the passage of this act shall be in any way affected by the provisions thereof.

Crimes for which prosecutions had not been begun are not included in this proviso. It will hardly be contended that prosecutions commenced can be construed to include prosecutions *not* commenced. It is not a sufficient explanation of the omission to say that crimes committed before the act would be excluded from its operation anyway, and so express mention was not necessary. Prosecutions for crimes already begun are mentioned. It might much more readily be inferred in the absence of express provision that prosecutions commenced should continue in the old jurisdiction, than that crimes not yet prosecuted should be. The mention of crimes committed would have included prosecutions commenced, but the reverse is not true. The more the omission is considered the more significant of the necessary construction does it become. Nor does the explanation *ex abundanti cautela* suffice, because the first exception to be mentioned from such a motive would be of crimes committed. The exception of "prosecutions commenced" from the operation of the act so necessarily implies that prosecutions *not* commenced for

crimes before the act are within its operation that an express provision could not make it plainer. *Expressio unius est exclusio alterius.*

It should be noted in this connection that the Oklahoma Act (chapter 182, Laws of 51st Congress, 1st session, page 182), which again changed jurisdiction over crimes in parts of Indian Territory, provided that "all actions commenced" and "crimes committed" in Oklahoma before the act should be finally disposed of in the court having jurisdiction as if the act had not been passed. The difference between the two acts is significant.

The act repeals all laws inconsistent with it. It may be forcibly argued that the repeal takes away the power to try crimes whenever committed from the court previously having jurisdiction, on the principle of *Railroad Company* vs. *Grant*, (98 U. S. R., 398, *supra*). Counsel for plaintiffs in error contend that until March 1st, 1889, there was no jurisdiction in which crimes in the Strip could be tried. In either view the result would be an absolute failure of justice, and men charged with murder are to march out of prison scot free, not because they are not guilty, not because they have not upon their hands the blood of their fellowmen, but because of a statutory failure to provide a court to try them. Every intendment should be given to prevent such a failure of justice.

It is true that statutes affecting the punishment of crime are to be strictly construed, but we do not understand that this rule of construction should apply to anything but the description of the offense. The tenderness of courts towards offenders in the construction of criminal

laws, arising as it did out of the cruel punishments of the old English common law, has continued in its influence upon judicial opinion much beyond the time when the reason for it has ceased; and it is respectfully submitted that it ought not to have any influence in the construction of a statute which affects only the question of jurisdiction.

It is the duty of courts to give some weight in their construction of such a statute to the public policy which requires that there should be furnished by the law for crimes thereby defined the proper machinery for trial and punishment. Society has rights as well as the criminal, and is entitled to the benefit of some presumptions in the construction of the laws. The court is bound to presume that Congress would not have left such crimes unprovided for, and so to entertain that construction of the statutes, if it can be fairly given, which will avoid the result that murder shall be denounced as a crime and shall not be punished as such. When, then, in the language of the proviso of the eighteenth section is found language strongly implying that crimes prior to the act and unprosecuted may be punished by the jurisdiction it confers, every consideration makes for that construction.

II.

IF THE COURT BELOW HAD NOT JURISDICTION THEN IT WAS IN THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

If the court shall be of the opinion that the act of March 1, 1889, did not confer upon the court below jurisdiction to try this crime, because committed before

its passage, it will be necessary to pass to the question whether any court has such jurisdiction. If any other court may try the plaintiffs in error, then the order on reversal will be to deliver them into the custody of the marshal of that court. (*United States* vs. *McBratney*, 104 U. S., 621–624; *Coleman* vs. *Tennessee*, 97 U. S., 509, 519.) We contend that if the court at Paris had not jurisdiction, then the court for the northern district of Texas had it.

By the act of January 6, 1883 (22 Stat. L., 400), in force when this crime was committed, certain jurisdiction in the Indian Territory was conferred upon the district court of Kansas and the circuit court for the northern district of Texas. The second and third sections of that act are as follows:

> SEC. 2. That all that part of the Indian Territory lying north of the Canadian River and east of Texas and the one-hundredth meridian not set apart and occupied by the Cherokee, Creek, and the Seminole Indian tribes shall, from and after the passage of this act, be annexed to and constitute a part of the United States judicial district of Kansas; and the United States district courts at Wichita and Fort Scott, in the district of Kansas, shall have exclusive original jurisdiction of all offenses committed within the limits of the territory hereby annexed to said district of Kansas against any of the laws of the United States now or that may hereafter be operative therein.
>
> SEC. 3. That all that portion of the Indian Territory not annexed to the district of Kansas by this act, and not set apart and occupied by the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Indian

> tribes, shall, from and after the passage of this act, be annexed to and constitute a part of the United States judicial District known as the Northern District of Texas; and the United States district court at Graham, in said Northern District of Texas, shall have exclusive original jurisdiction of all offenses committed within the limits of the territory hereby annexed to the said northern district of Texas, against any of the laws of the United States now or that may hereafter be operative therein.

If Indian Territory, as here used, included the Neutral Strip, then, at the time of the commission of the offense, the circuit court for the northern district of Texas had jurisdiction to try it. We may presume that the court will not put such a construction upon both the acts of 1889 and of 1883 as to allow persons guilty of murder to escape punishment if the place of the crime has been within the jurisdiction of first the one and then the other, and has been merely transferred by Congress from one to the other.

The question arising upon the act of 1883 is whether Indian Territory as there used included the Neutral Strip. We claim that it did, and we hope to show this by the history of the Strip and the Indian Territory, by executive recognition and by express legislation of Congress.

It should first be stated that the Indian Territory was a geographical division of unorganized territory in the United States, and is entirely different from Indian country. The latter is a term of general application to all land within the United States to which the title of the Indian tribes has not been extinguished. (*Bates* vs. *Clark*,

95 U. S., 204; *Ex parte Crow Dog*, 109 U. S., 556.) It is manifest that "the Indian country" refers to reservations all over the United States and changes as those reservations change, while "the Indian Territory" has come to have a definite geographical location.

The distinction between the two is made very clear by a reference to the last ten sections of the act of March 1, 1889. The act in its first section, as we have seen, bounds and specifically defines the Indian Territory, certain portions of which had ceased to be Indian country for a number of years.

Section 20 provides a punishment for every person who, "in the Indian Territory," places an obstruction on the railroad track.

Section 21 provides a punishment for any one who, "in the Indian Territory," destroys any telegraph or telephone line.

Section 22 provides a punishment for any one who, "in the Indian Territory," maliciously or contemptuously disturbs a religious congregation.

Section 23 provides—

> Every person aforesaid who shall, in the *Indian country*, feloniously, willfully, and with malice aforethought, assault any person with intent to rob, and his counselors, aiders, and abettors, shall, on conviction thereof, be imprisoned at hard labor for a time not less than one nor more than fifteen years.

Section 24 provides a punishment for every one who, "in the Indian Terrritory," shall alter the brands of any animals the subject of larceny, or administer poison to

them, and provides that in the same trial the jury may assess damages and the court render judgment for threefold the amount of damage in favor of the party who owns the animal if it shall be killed or injured.

Section 25 provides that any person "in the *Indian country*" who assaults another with a deadly weapon, with intent to inflict bodily injury, shall be adjudged guilty of a misdemeanor and shall be fined and imprisoned.

Section 26 provides a punishment for any person who shall maliciously and willfully set any fire in woods, marshes, or prairies in the "Indian Territory."

Section 27 provides that sections 5, 23, 24, and 25 shall not apply to offenses committed by one Indian upon the person or property of another.

An examination of the crimes here denounced will disclose that sections 23 and 25 supply an omission long existing in the criminal laws applicable to the Indian country (*U. S.* vs. *Terrell*, Hempstead 411, 413, and 422), while sections 20, 21, 22, 24, and 26 are probably directed to crimes especially prevalent in "the Indian Territory" proper.

But while the Indian Territory and the Indian country are not interchangeable terms, they are closely connected. Before the Oklahoma act there was a continuous tract of unorganized territory lying west of Missouri and Arkansas and east of Texas and New Mexico and between the State of Texas on the south and Kansas on the north which had been recognized as Indian country by the Government, and had not been open for homestead settlement by the citizens of the United States. These cir-

cumstances led to the application of the name Indian Territory to the tract as a geographical division.

The history of the Neutral Strip which made part of this continuous tract is interesting. By the treaty with Mexico dated in January, 1828 (8 Stat. L., 374), the line between Mexico and this country was established as the 100th meridian west of Greenwich, between the Red River and the Arkansas. The Neutral Strip was then in Mexico, therefore. When Texas became an independent republic the Strip became a part of its territory. December 29, 1845, Texas was admitted as a State into this Union (9 Stat. L., 108). It then embraced all of its present territory and what is now included in New Mexico and Arizona, parts of Kansas and Colorado, and the Neutral Strip. On the same date, the United States disrict court of Texas was organized. The Strip was then within its jurisdiction and that of the courts of that State, because it was part of the State. Sept. 9, 1850 (9 Stat. L., 446), the size of Texas was reduced to its present limits, the remainder of its territory being ceded by it to the United States. By the same act of Congress, all the territory ceded was created into the Territory of New Mexico except the Neutral Strip and the southwest corner of Kansas, which is now embraced between the Arkansas River and the south and west lines of that State. By this cession the Strip passed out of the jurisdiction of Texas and, as we shall hope to show hereafter, was embraced in the territory annexed for judicial purposes to the district of Arkansas.

A.

Indian history of Strip.

It was then Indian country, as will appear from a treaty made by the United States on the 25th of July, 1853, with the Comanche, Kiowa, and Apache tribes (10 Stats., 1013). The treaty is stated as follows:

> Articles of a treaty, made and concluded at Fort Atkinson, in the Indian Territory of the United States of America, on the twenty-seventh day of July, Anno Domini, eighteen hundred and fifty-three, between the United States of America, by Thomas Fitzpatrick, Indian agent and sole commissioner, duly appointed for that purpose, and the Comanche, and Kiowa, and Apache tribes or nations of Indians, inhabiting said territory south of the Arkansas River.

The third article of the treaty recognized the right of the United States to lay off and mark out roads or highways and to prescribe and regulate the rights of person and property among the Indian tribes.

Article 4 provides for a restitution by the tribes for injuries done by them or their members to citizens of the United States.

Article 5 provides that the Indians shall make no incursions into Mexico.

Article 6 is a stipulation by the Government to pay $18,000 per annum for ten years.

Article 7 provides that the United States is to protect the Indians from committal of any depredations upon them, or in their territories by people of the United States.

Article 8 gives the United States power to withhold annuity in case of violation of duty, and until Indians offending against the laws of the United States should be delivered up to justice.

> Article 9 provides as follows: It is also consented to and determined between the parties hereto that the annuities to be given on the part of the United States, as provided in the sixth article of this treaty, shall be delivered to the said Indian tribes, collectively, at or in the vicinity of Beaver Creek, yearly, during the month of July in each year, until some other time and place shall have been designated by the President of the United States, in which event the said Indian tribes shall have due notice thereof, and the place of distribution which may be selected shall always be some point within the territories occupied by the said tribes.

Beaver Creek, mentioned in the last clause of this treaty, is all of it understood to be within the limits of the Neutral Strip, a fact which establishes that the country of the Comanches and Kiowas and the Apaches covered the Neutral Strip and that part lying north of the Neutral Strip, which is now the southwest corner of Kansas, between the Arkansas River and the south and west borders of the State. As far as appears, this continued to be the home of these Indian tribes until 1865, when a second treaty was concluded with the Comanches and Kiowas October 14, 1865 (14 Stats., 717–721). By this treaty the United States ceded certain territory to the Indians. The cession is found in the second article, which provides that—

> The United States hereby agree that the district of country embraced within the following limits, or such

portions of the same as may hereafter from time to time be designated by the President of the United States for that purpose, viz: commencing at the northeast corner of New Mexico, thence south to the southeast corner of the same, thence northeastwardly to a point on main Red River opposite the mouth of the north fork of the said river; thence down said river to the 98th degree of west longtitude; thence due north on the said meridian to the Cimarone River; thence up said river to a point where the same crosses the southern boundary of the State of Kansas; thence along said southern boundary of Kansas to the southwest corner of said State; thence west to the place of beginning, shall be, and is hereby set apart for the absolute and undisturbed use and occupation of the tribes who are parties to this treaty, and of such other friendly tribes as have heretofore resided within said limits, or as they may from time to time agree to admit among them, and that no white person, except officers, agents, and employees of the Government, shall go upon or settle within the country embraced within said limits, unless formally admitted and incorporated into some one of the tribes lawfully residing there, according to its laws and usages.

The territory thus described includes the northwest part of the State of Texas, that southwest portion of the Indian Territory now occupied by these Indian tribes, and the Neutral Strip. The cession was made immediately after the civil war. Texas was then under a provisional government. However unfounded may have been the right of the United States to cede to these Indian tribes a part of Texas for their occupancy, it is clear that the cession operated to convey the Neutral Strip, which was completely under the jurisdiction of the United States. In view of

the treaty of 1853, this was rather a confirmation of title than a cession of it.

October 21, 1867, a third treaty was made with the Kiowas and Comanches, 15 Stats., 581–587, in which the territory ceded was much reduced and was confined to the southwest corner of the Indian Territory, bounded by Texas on the south and Texas on the west, between the ninety-eighth and one hundredth meridian. In this treaty of 1867 there is still reserved by the 11th article to the Indians the right to hunt on any lands south of the Arkansas River, so long as the buffalo may range thereon in such numbers as to justify the chase. This, of course, covered the Neutral Strip. How long the right continued we do not know.

It is very clear from these treaties that the Neutral Strip was Indian country, under the definition given in *ex parte Crow Dog* (109 U. S., 556), from the time the United States acquired jurisdiction over it in 1850 until some time after the year 1867.

It was called in 1853, as we see by the words of the treaty, "The Indian Territory." It must be conceded that the term, as there used, is the equivalent of "The Indian country." The name had probably not then acquired the definite geographical meaning now attached to it. In 1865, however, when the definite cession of the Neutral Strip to the Comanches and Kiowas was made, the policy of the Government to place the various Indian tribes within a continuous territory between Texas on the south and Kansas on the north and west of Missouri and Arkansas was in full operation, and the selection of the Neutral Strip for this purpose is an indication that it was

then regarded as a part of the territory to be used by the Government for Indian reservations within "The Indian Territory."

Since 1867 the Strip has not been occupied by Indians, but it has never been opened to settlement by the Government. At any time the Government might have settled an Indian tribe upon it, and the natural presumption is that it was being held for that purpose.

B.

Executive recognition of the Strip as part of the Indian Territory.

In the report of the Land Commissioner for the year 1864 is found a map "constructed from public surveys and other official sources in the General Land Office," in which the Neutral Strip is included within the boundaries of the Indian Territory, a very natural and correct representation when it is considered that about this time it was being used for the very purposes for which all the land in the Indian Territory was held.

In April, 1883, Beaver was established as a post office. It was the first one in Neutral Strip. It was established by the Post Office Department as in the Indian Territory, and the public were directed by that Department to direct their letters "Beaver, Neutral Strip, Indian Territory." The records of the Post Office Department will show this, and it will be seen by a reference to the post office guide, issued every three months by that Department. The same is true of half a dozen other post offices since established in the Strip.

It is true that the tract was known as the Public-Land Strip, because it belonged to the Government, and since 1867 no Indian tribe has had any title to it. But its association and location logically put it in the Indian Territory before that time, and there it has since remained.

We are aware that in the last few years one or two Land Commissioners, and perhaps some Congressmen, have given it as their opinion, expressed in public documents, that the Neutral Strip was no part of the Indian Territory, and was attached to no judicial district. As expressions of opinion, these perhaps are entitled to consideration from the court, but they are mere opinion, derived from the same sources which we have and which the court has within its reach. We differ with these opinions, and respectfully contend that they are not correct. The only opinion of paramount importance in such a discussion is the opinion of Congress, expressed in its legislation, and that we find in several acts.

C.

Congressional recognition.

In the act of January 6, 1883, conferring jurisdiction on the court for the northern district of Texas, is language from which the clear implication is that the Neutral Strip was a part of the Indian Territory. It provides that all that part of the Indian Territory lying north of the Canadian River and east of Texas and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes should be annexed to and constitute a part of the judicial district of Kansas.

The implication plainly is that there was a part of the Indian Territory lying west of the one hundredth meridian not therein included. Such was the opinion of Mr. Justice Brewer, sitting as circuit judge, expressed in the case of *in re Jackson*, 40 Federal Reporter, 372. (For full text of opinion see appendix.)

Again, on March 2, 1887 (24 Stats. L. 446), Congress passed an act entitled "An act to grant a right of way *through the Indian Territory* to the Chicago, Kansas and Nebraska Railway Company, and for other purposes." The first section of this act authorized the corporation named to operate, use, and maintain "a railway telegraph and telephone line *through the Indian Territory, beginning at a point on the northern line of said Territory at* or near the south line of the State of Kansas crossed by the one hundred and first meridian, thence in a southwesterly direction by the most practicable route toward El Paso, New Mexico," and also

"Beginning at a point on the south line of the State of Kansas, near the city of Caldwell, in Sumner County, thence running on the most practicable route to or near Fort Reno, and from thence in a southerly direction to the south line of the Indian Territory in the direction of Galveston, Texas, and also in a southwesterly direction to the south line of said Territory in the direction of Cisco, in the State of Texas, with the right to construct," etc.

Section 8 provides that the circuit and district courts for the western district of Arkansas and the district of Kansas, and such other courts as may be authorized by Congress, shall have concurrent jurisdiction over all controversies arising between the railroad company and the

nation and tribe through whose territory it shall be constructed, and in the last clause that "the civil jurisdiction of said courts is hereby extended within the limits of said Indian Territory, without distinction as to the citizenship of the party so far as may be necessary to carry out the provisions of this act."

Here is a full and complete recognition of the fact that the Neutral Strip was a part of Indian Territory considered as a geographical division. The one hundred and first meridian is a full degree west of the eastern limit of the Neutral Strip. A railway which should start at or near the intersection of the one hundred and first meridian with the southern boundary of Kansas and run in a southwesterly direction to El Paso, Tex., would not be, any part of it, in Indian Territory, unless the Strip is to be so considered.

Finally the act of March 1, 1889, defines the Indian Territory expressly to be bounded on the west by New Mexico. In view of the facts heretofore stated, the history of the Strip as a part of the Indian country; its being withheld from homestead settlement; the recognition by the Land Office in the map of 1864 of it as a part of the Indian Territory; a similar recognition by the Post-Office Department since 1883; the implication in the act of 1883; and the express recognition of the act in 1887, we must regard the language of the act of 1889 not as adding the Strip to the Indian Territory, but as a clear expression of the opinion of Congress put into enacted law that the Neutral Strip was properly a part of the Indian Territory, and ought, therefore, by the courts to be so regarded.

The language used in the Oklahoma act is not significant. At that time, by the act of March 1, 1889, the public land had become by law a part of the Indian Territory, whatever it was before, and a failure to describe it as such at that time is not material.

In addition to the reasons which have been given why the Neutral Strip should be treated as part of the Indian Territory, there is the weighty consideration that Congress can not be presumed to have left for forty years so large a tract of land, 35 miles wide by nearly 200 miles long, utterly without civil and criminal jurisdiction by some specified court. Every intendment should be made in favor of including it within the protection of some particular judicial tribunal. It seems impossible to conceive that Congress should be so derelict in its duty. Any evidence, therefore, tending to show that in the Congressional mind this anomalous tract of land was included within a defined judicial district derives tenfold weight from the consideration stated.

D.

The argument of the plaintiffs in error based on the history of the district of Arkansas.

The counsel for the plaintiffs in error rely very strongly on the history of the district of Arkansas to sustain the view that the Indian Territory does not include the Neutral Strip. The 4th section of the act of January 6, 1883, is as follows:

> SEC. 4. That nothing contained in this act shall be construed to affect in any manner any action or pro-

> ceeding now pending in the circuit or district court for the western district of Arkansas, nor the execution of any process relating thereto; nor shall anything in this act be construed to give to said district courts of Kansas and Texas, respectively, any greater jurisdiction in that part of said Indian Territory so as aforesaid annexed, respectively, to said district of Kansas and said northern district of Texas, than might heretofore have been lawfully exercised therein by the western district of Arkansas; nor shall anything in this act contained be construed to violate or impair in any respect any treaty provision whatever.

The contention is that this section shows that the territorial jurisdiction of the courts of Kansas and of Texas conferred in the act could not extend territorially beyond that which had been previously exercised in this region by the western district of Arkansas. The legislation with reference to the territorial jurisdiction of the Arkansas court over the Indian Territory is then referred to to show that it did not include the Neutral Strip.

It must be said, first, with respect to this argument that section 4, quoted above, does not refer to the territorial jurisdiction at all. Its reference is to that limitation, until 1885, imposed upon all courts administering criminal law of the United States in the Indian country, namely, that they shall not consider offenses committed or injuries inflicted by one Indian upon another Indian.

But conceding for the purpose of this argument that this is a recognition that the Indian Territory in the act of 1883 does not include more than the same expression in the act of January 31, 1877 (19 Stats., 230), we contend that the jurisdiction of the court of Arkansas under

that act extended to the Neutral Strip. The act of 1877 is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section five hundred and thirty-three of the Revised Statutes be amended so as to read as follows:
>
> "SEC. 533. That the State of Arkansas is divided into two districts, which shall be called the eastern and western districts of Arkansas. The western district includes the counties of Benton, Washington, Crawford, Sebastian, Scott, Polk, Sevier, Little River, Howard, Montgomery, Yell, Logan, Franklin, Johnson, Madison, Newton, Carroll, Boone, and Marion, and the country lying west of Missouri and Arkansas, known as the Indian Territory. The eastern district includes the residue of the State."

Section 533 of the Revised Statutes uses the same language in describing the annexed jurisdiction of the Arkansas court. Down to the Revised Statutes the jurisdiction of the western district of Arkansas in the annexed district was described as

> Jurisdiction to hear, try, determine, and punish all crimes committed within that part of the Indian country designated in the twenty-fourth section of the act to which this is a supplement, and therein and thereby annexed to the district of Arkansas. (5 Stats., 680. 9 Stat. L., 594.)

The twenty-fourth section of the act referred to, which is the act of June 30, 1834 (4 Stats., 729–733)—an act to regulate intercourse with Indian tribes—is as follows:

> SEC. 24. *And be it further enacted*, That for the sole pupose of carrying this act into effect, all that part of

> the Indian country west of the Mississippi River that is bounded north by the north line of lands assigned to the Osage tribe of Indians produced east to the State of Missouri; west, by the Mexican possession; south, by Red River; and east, by the west line of the Territory of Arkansas and the State of Missouri, shall be, and hereby is, annexed to the Territory of Arkansas; and that for the purpose aforesaid the residue of the Indian country west of the said Mississippi River shall be, and hereby is, annexed to the judicial district of Missouri; and for the purpose aforesaid the several portions of Indian country east of the said Mississippi River shall be, and are hereby, severally annexed to the Territory in which they are situate.

The first section of the act of 1834 described what was meant by the Indian country as follows:

> SEC. I. *Be it enacted, etc.*, That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, and also that portion of the United States east of the Mississippi River, and not within any State to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

Now it is evident that it was the purpose of this act to divide between the courts of Missouri and Arkansas jurisdiction over all the country in the United States to which the Indian title had not been extinguished, lying west of the Mississippi River, and not included in the States of Missouri and Louisiana or the Territory of Arkansas. Taken literally, and as it was intended when the act of 1834 was passed, this definition of Indian country

could not apply to any Indian country lying at the time in the Mexican possessions. Yet the Supreme Court has held that the meaning of the term expanded with the march of empire westward, and that it now includes all the Indian country lying anywhere in the jurisdiction of the United States. (Ex parte Crow Dog, 109 U. S. R., 556.)

In the same way it is respectfully contended that the jurisdiction of the court of Arkansas expanded as the "Indian country" expanded, because the 1st and the 24th sections of the act of 1834 are *in pari materia*. If the description of the annexed jurisdiction of the Arkansas court in the 24th section had simply been, "All the Indian country lying south of the north line of the Osage Reservation," it would have exactly described the country which was thereby annexed. Such a description would certainly have expanded as the western territory of the United States was added to, under the decision in *ex parte Crow Dog, supra*, to include such Indian country as lay south of the north line of the Osage Reservation not included in any other jurisdiction.

Why, under the description which was used, should the effect be different? The use of the Mexican possessions as a western boundary was only the same thing as saying "to the western boundary of the United States." In 1850 the Mexican possessions had ceased to form any boundary at all. Then there lay immediately west of the one hundredth meridian and forming a continuous tract with other Indian country east of it this Neutral Strip, the home of the Comanches, and for twenty-

seven years thereafter Indian country. It is only reasonable, therefore, to construe the description, which, literally construed, was wholly inapplicable to the changed circumstances in 1850, as then extending to the next jurisdiction west of Arkansas, which was New Mexico, and thus to include within the jurisdiction of the Arkansas court the Neutral Strip.

But even if the Arkansas court had no jurisdiction in the Neutral Strip before 1873 the language of section 533 would give it. The "Indian Territory" was necessarily different from the Indian country described in 24th section of the act of 1834. The north line of the lands assigned to the Osage Indians produced east to the State of Missouri ran west through what is now the State of Kansas at a considerable distance—more than fifty miles—north of what is now the southern boundary of that State. (See treaty with Osage Indians June 2, 1825, 7 Stat. L., 240.)

The Osage tribes continued to occupy this portion of Kansas until 1872 (16 Stat. L., 228). It was therefore Indian country until that time, and until 1854 was in the jurisdiction of the Arkansas court. The organization of Kansas as a territory, however, and of Territorial courts therein, in 1854, conferred upon such courts, in their exercise of Federal powers, jurisdiction to punish offenses against the laws of the United States committed in the Indian country within the exterior limits of the Territory, although such country was excepted out of the boundaries for Territorial jurisdiction. (*Ex parte* Crow Dog, 109 U. S., 556, 559-562.)

The Indian Territory referred to in the Revised Statutes, section 533, differed from the Indian country described in the 24th section of the act of 1834, therefore, by nearly one-quarter of the Territory of Kansas. It is not proper therefore to say that the 24th section of the act of 1834 is to be treated as *in pari materia* with section 533 of the Revised Statutes. If such a change was effected in the description by section 533 it is not too much to say that the extension of the district to include the Neutral Strip was also effected. This is manifest when, as we have elsewhere shown, the Indian Territory properly includes it.

III.

IF NEITHER OF THE TEXAS COURTS HAD JURISDICTION, THEN IT WAS IN THE CIRCUIT COURT OF KANSAS.

This Neutral Strip was unquestionably land within the exclusive jurisdiction of the United States. If no court was expressly given jurisdiction over it, then section 730, Revised Statutes, has application to it.

Says Mr. Justice Gray, in *Jones* vs. *The United States*, No. 1143, October term, 1890:

> Congress has directed that "the trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought." (Rev. Stat., sec. 730.) And Congress has awarded the punishment of death to the crime of murder, whether committed upon the high seas or other tide waters out of the jurisdiction of any particular State, or "within any fort, arsenal,

dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States." (Rev. Stat., sec. 5339.) Both these acts of Congress clearly include murder committed on any land within the exclusive jurisdiction of the United States and not within any judicial district, as well as murder committed on the high seas. (*Ex parte Bollman*, 4 Cranch, 75, 136; *United States* v. *Bevans*, 3 Wheat., 336, 390, 391; *United States* v. *Arwo*, 19 Wall., 486.)

We believe the statement of counsel for plaintiffs in error that the latter were arrested in Kansas is correct. Under section 730, therefore, that court would have jurisdiction of this case in case neither of the courts of Texas has it.

Respectfully submitted.

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WM. H. TAFT,
Solicitor-General.

Appendix.

Brewer, *C. J.* In the case *Ex parte Jackson* the facts are these: The petitioner was indicted by the Federal court of the eastern district of Texas for the crime of murder, committed in the year 1888, in the district known as "No Man's Land." He was arrested in this State, and a removal is sought to the Texas district. To prevent that, this petition in habeas corpus has been filed; and the question presented is as to the jurisdiction of the Texas court over the territory and the offense, and the duty of this court on habeas corpus. If the jurisdiction of that court, both as to the territory and the offense, was clear, the duty of this court would be imperative to deny the petition, and see that the petitioner be removed to that district. On the other hand, if it were clear that that court did not have jurisdiction, either as to the territory or the offense, then it would in like manner be the imperative duty of this court to sustain the petition, and discharge the petitioner. But neither of those is this case. Again, if it was a case where the question was which of two courts had jurisdiction, then it would be the duty of this court to determine, if it were a matter of doubt, which most probably had jurisdiction, and send the petitioner there. But this case does not even present that question, for here, confessedly, no court has jurisdiction, unless it be the Texas court; and the question is, what is the duty of this court under such circumstances as these? Conceding that the jurisdiction of the Texas court be doubtful, if it

have no jurisdiction, then there is no jurisdiction to punish this offense. In a case like that, I conceive that if there be fair reason for believing that that court has jurisdiction, or that that court, being a court of equal authority with this, with the right to determine the extent of its own jurisdiction, would, on inquiry, hold in favor of that jurisdiction, then, as in no other way can inquiry be made into this alleged offense, this court ought to remit the party to that court.

Has that court jurisdiction? The homicide took place in "No Man's Land," in 1888, as alleged. What is known as the "Indian country," or the "Indian Territory," was first defined and bounded by the act of June 30, 1834, (4 Stat. at L. 729). That definition is as follows:

> That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, and also that part of the United States east of the Mississippi River, and not within any State to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

Now the expressions "Indian country" and "Indian territory" are used interchangeably in the statutes. We speak of the Indian Territory, but politically, that is a mistake. There is no organization. It is more properly a territory referring simply to geographical extension, and not to any political organization. At the time this act of 1834 was passed, "No Man's Land" was not a part of the United States. It did not then come within "Indian country," as defined; and unquestionably many treaties and acts of Congress have been made and passed since in which the western boundary of this Indian country or Indian territory is, by implication at least, located on the

100th meridian, which is the eastern boundary of "No Man's Land." And yet this original territorial boundary may, without any undue stretch of language, be regarded as a shifting boundary. It is not a boundary prescribed for the purpose of political organization, or for a deed or other conveyance. It is a boundary for the mere purpose of defining the territory over which certain laws of the United States will have operation. Being such a boundary, it would not be improper to consider that boundary shifting, whenever other territory was properly subjected to the operation of the same laws. It would be changed by the organization of any part of this territory into a political territory of the United States. It might be changed whenever the territorial boundaries of the United States were extended westward, by purchase or conquest, into country unoccupied, save by the Indians. It may be regarded as a boundary certain, but shifting; something on the principal controlling the boundary of a lot on a river or on a lake. That boundary is certain, though it may be shifting. By accretions, the water line may be extended far into the river or the lake, but still it is the water front. So here, considering the purpose for which the Indian country was bounded, one may fairly infer that that boundary shifted as the territorial extensions of the United States increased, or as territory was carved out of it for political organization. That such is the real force of that description is evident from the case of *Ex parte Crow Dog*, in 109 U. S., 556 (3 Sup. Ct. Rep., 396). The syllabus, and the opinion bears this out, reads as follows:

> The definition of the term "Indian country" contained in chapter 161, sec. 1, of the act of 1834 (4 St., 729), though not incorporated in the Revised Statutes, and though repealed simultaneously with other enactments, may be referred to in order to determine what is meant by the term when used in

> the statutes; and it applies to all the country to which the Indian title has not been extinguished within the limits of the United States, whether within a reservation or not, and whether acquired before or since the passage of that act.

This territory was acquired since the passage of that act.

As I said, however, there are many treaties and statutes since that in which the implication is manifest that the 100th meridian was the western boundary, or was regarded as the western boundary of the Indian Territory. That, of course, throws doubt upon the scope of that decision. On the other hand, we find some in which it is equally clear that this "No Man's Land" is recognized as a part of the Indian Territory, as in article 2 of the treaty with the Comanches and Kiowas, October 18, 1865, found in 14 Statutes at Large, 718. But, coming closer than that, in the act of 1883, in which there was an attempted partition of the jurisdiction over the Indian Territory between the district of Kansas, the northern district of Texas, and the eastern district of Arkansas, in describing that portion of the Territory which was assigned to the district of Kansas, it is declared that "all that part of the Indian Territory lying north of the Canadian River and east of Texas and the one hundredth meridian," be annexed to and constituted a part of the United States judicial district of Kansas. "That part of the Indian Territory east of Texas and the one hundredth meridian," implying that there was some portion of the Territory west of the one or the other of these two. And section 3 says:

> All that portion of the Indian Territory not annexed to the district of Kansas by this act, and not set apart and occupied by the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Indian tribes, shall, from and after the passage of this act, be annexed to

and constitute a part of the United States judicial district known as the "northern district of Texas" (22 St., 400).

Of course, this is mere implication, but it certainly is strong implication, that there was some territory lying west of the 100th meridian; and it could only be that which is known as "No Man's Land." That was in 1883.

Coming down to 1889, an act was passed to establish a United States court in the Indian Territory, which is found in 25 U. S. St. at Large, 783, in which the Indian Territory is bounded: "That a United States court is hereby established whose jurisdiction shall extend over the Indian Territory, bounded as follows:" (Then it bounds it so as to include "No Man's Land.") This is either a recognition by Congress of that as the previous boundary of this Indian Territory, or is an assertion that henceforward such should be the boundary. The court created by this act was given jurisdiction of misdemeanors. The seventeenth section of that act attached to the eastern judicial district of Texas all that portion of the Indian Territory not otherwise assigned, and included "No Man's Land," if it were a part of the Territory. Now, where a term is used and defined in the opening part of a statute, the use of that term thereafter in the statute is with the same meaning, and the same definition. The "Indian Territory" is bounded in the first section so as to include "No Man's Land." That term used thereafter, without any defin ition of boundary, means the same territory. Hence I have no question but that by said section 17 the jurisdiction over this "No Man's Land" was assigned to the eastern district of Texas. That, of course, was since the offense was charged to have been committed.

My conclusions, then, are these: That to-day, and since March, 1889, the court of the eastern district of Texas has jurisdiction over "No Man's Land." Prob-

ably, also, the court of the northern district of Texas had like jurisdiction prior thereto, and since 1883; and, there being a Federal court, with jurisdiction territorially, with ministerial officers, a clerk, and a marshal, there is no trouble in finding all the machinery for purposes of trial. Under those circumstances, it seems to me that it is the duty of this court to deny this petition.